Supreme Court, U.S.
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No. 95-_____

In The
Supreme Court Of The United States
October Term, 1994

JAMES E. SMITH,

Petitioner,

v.

DELBERT W. PIFER,

Respondent.

Petition For A Writ Of Certiorari
To The Court Of Appeal, Fourth Appellate District,
Division One, State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Contract Clause violated once the necessary building permits are acquired, and a property purchaser then rescinds a land sales contract on the basis of action taken by the governing authority which declared the property unbuildable, even though it was the same governing body which granted the approval in the first place?

2. Is Due Process violated when sections 831 and 1112 of the California Civil Code (dealing with the presumptions of ownership of an adjacent roadway) are applied to an action which has for its purpose the determination of whether or not the sale of property adjacent to a roadway constituted an illegal subdivision as defined in the California Government Code Subdivision Map Act?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, James E. Smith, an individual, and the Respondent, Delbert W. Pifer, an individual.

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Petition For A Writ Of Certiorari
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PETITION FOR WRIT OF CERTIORARI

The petitioner James E. Smith respectfully prays that a writ of certiorari issue to review the October 3, 1994 opinion, modified on October 24, 1994, of the Court of Appeal, Fourth Appellate District, Division One, State of California, in the above-captioned proceeding.

OPINIONS BELOW

The California Supreme Court on December 21, 1994 denied the Petition for Review which was not reported and is reprinted in the Appendix hereto at Appendix A.

The Opinion of the Court of Appeal, Fourth Appellate District, Division One, dated October 3, 1994 was not reported, and is reprinted at Appendix B, 35-56; and was modified by order on October 24, 1994 (Appendix B, 57-59), after the October 18, 1994 Petition for Rehearing (Appendix F).

The Orders after court hearing of the Superior Court of San Diego County, dated April 15, 1992, were not reported, and are reprinted at Appendix F and G.

STATEMENT OF JURISDICTION

Petitioner seeks review of the October 3, 1994 Modified Opinion of the Court of Appeal, Fourth Appellate District, Division One.

The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment at § 1 of the United States Constitution provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

Respondent/Purchaser received permits from the California Coastal Commission (Appendix N) and approval from the Design Review Board of Del Mar, California (Appendix M) authorizing him to build upon the lot "U" which had been purchased from Petitioner/Seller. Under California law this constituted both direct and statutory authority for the contention that the lot sold was a legal lot suitable for building a residence.

The City of Del Mar then determined that, by virtue of California Civil Code sections 831 and 1112, Petitioner/Seller had created an illegal lot as a result of the language used by him in the sale escrow instructions. Thereafter, the city caused, in accordance with the California Subdivision Map Act, a Notice of Violation to be filed, thereby paving the way for Respondent to rescind the contract.

Petitioner had a legally cognizable interest and property right which was taken from him in an arbitrary and capricious manner resulting in a violation of his due

process rights. This right was afforded him by the Map Act and gave him, by virtue of a Final Subdivision Map, legal lots of record, of which Lot "U" was one. It was taken from him by use of the rule regarding presumed ownership of one-half of roadways adjacent to acquired property.

The substance of the rule of construction almost everywhere recognized, and which in a minority of cases is characterized as a rule of presumption, is that if land abutting on a roadway is conveyed by a description effective to cover it, the grantee, as part and parcel of the grant, takes title to the center line of the roadway if the grantor owns so much, unless an intention to the contrary sufficiently appears.

In California this doctrine is codified as a rebuttable presumption at California Civil Code sections 831 and 1112, which were enacted in 1872.

The provisions of the California Subdivision Map Act explored herein deal primarily with the Act's mandates providing that the City is prohibited from finding that property formerly approved for a building permit is then unsuitable for that permit even though the circumstances had not changed since the approvals were granted.

Of equal significance are Map Act sections 66499.32 and 66424. The first section deals with the Map Act's exemption from a rescission action of those sellers who identify the property being sold by reference to a recorded final map. The latter provision defines what a "subdivision" is.

Each of these statutes were interpreted by the City of Del Mar as well as the courts below in such a way as to deny Petitioner his rights under the Due Process Clause of the Fourteenth Amendment.

Furthermore, by voting to record a Notice of Violation upon the subject property, the City Council of Del Mar impermissibly impaired Petitioner's obligation of contract rights under Article I Section 10 of the United States Constitution which provides in pertinent part: "No State shall . . . pass any . . . law impairing the obligation of contracts."

REQUEST FOR JUDICIAL NOTICE

Petitioner hereby requests this Court to take Judicial Notice of Case No. 93-163, filed in this Court on August 2, 1993; and Case No. 93-359, filed in this Court on September 2, 1993.

Also, case number 93-488 which was filed in this Court on September 24, 1993. The instant case was consolidated at the trial level with case no. 93-488. Both cases address many of the same issues although at the same time they significantly differ in that unlike 93-488, Respondent in the instant petition received building approvals from the City of Del Mar as well as the California Coastal Commission.

STATEMENT OF THE CASE

Petitioner revisits this Honorable Court once again on the issues and others expounded upon in case number 93-488 filed on September 24, 1993. The issues addressed therein are no less significant today and are probably more so given this court's recent rulings in the area of private property rights.

This case involves the right of a seller to express in the land sale documents his intention to exclude from the transaction one-half of the roadway adjacent to the land being sold by him. Petitioner has a Constitutional right as the seller to express this intention, in accordance with the law, without reprisals from the local governing body in the form of denial of due process rights as well as impairment of Petitioner's contract rights.

This case concerns the sale of a real property lot designated as Lot "U." This lot was created in 1911 along with other lots forming part of a subdivision and depicted on Final Map #1343, Block 12 of Arden Heights Unit No. 4, in the City of Del Mar, California. (Appendix L).

On October 13, 1989 Petitioner James E. Smith sold Lot "U" to Respondent Delbert W. Pifer by grant deed. (Appendix I, 15-16).

Included within the sale documents (escrow instructions) was the following language:

> "8. Buyer and seller agree that seller is retaining ownership of vacated Oribia Street which joins Lot "U" East Line." (Appendix I,13).

This language was mandatory in order to avoid the effect of sections 831 and 1112 of the California Civil Code which addresses the presumption of ownership to the centerline of an adjacent roadway when there is an absence of the language in the sales documents.

However, the City of Del Mar, through the City Council, concluded that this language served to illegally divide Lot "U" in violation of the California Subdivision Map Act. (Appendix I, 17-18).

Thereafter, on January 14, 1991 the City Council of Del Mar caused to be filed and recorded a Notice of Violation upon Lot "U." This had the effect of permitting the Respondent to rescind his contract with Petitioner. (Appendix I, 19).

Respondent then filed his complaint for rescission on May 15, 1991. (Appendix I). Petitioner answered on May 24, 1991. (Appendix H).

The litigation reached the Summary Judgment stage where the Superior Court granted Respondent's motion and denied Petitioner's. (Appendices G and F).

The rationale for the court's decision on the Summary Judgment motions was that in 1925, when the roadways of the original subdivision were vacated and abandoned by the county, the presumptions embodied

in sections 831 and 1112 served to effectuate the creation of a Lot "U" larger than the one originally created and depicted on final map #1343.

Therefore, the trial court concluded, since the Lot "U" created by virtue of the 1925 street abandonment extended to the centerline of the adjoining roadway by authority of sections 831 and 1112, then, when Petitioner included the retention language in the escrow instructions, the larger lot was split illegally. (Appendix G).

The holding was affirmed by the Court of Appeal in an unpublished modified opinion (Appendix B,35-36) and B,57-59). However, the Court of Appeal disingenuously expanded the rationale proffered by the trial court and concluded that the presumptions of sections 831 and 1112 could only be rebutted by the contrary intent of the original subdivider.

The California Supreme Court declined review. (Appendix A).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals. This ground for review is present in this case.

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. This ground for review is present in this case.

The federal questions involved here deal with Petitioner's Due Process rights and his right to have his lawfully protected contract free from impairment by the Del Mar City Council, a right protected by Article I section 10 of the U.S. Constitution.

I.

THE DEL MAR CITY COUNCIL IMPAIRED PETITIONER'S CONTRACTUAL RIGHTS IN VIOLATION OF ARTICLE I SECTION 10 OF THE U.S. CONSTITUTION

In pertinent part, Article I section 10 provides:

> "No state shall . . . pass any . . . law impairing the obligation of contracts."

The contract entered into between Petitioner and Respondent was for the sale of land. Petitioner sold the property by way of grant deed (Appendix I,15-16) and a note secured by way of a deed of trust was given Petitioner by Respondent (Appendix L). This contract is one within the meaning of the Contract Clause of the Federal Constitution and therefore protectable under

the Constitution. In a case dealing with almost the identical issue involved herein, a state court held:

> "In Louisiana a sale of land by fixed boundaries is a sale per aversionem. Deeply imbedded in our law is the principle that in such a sale the purchaser acquires only the land included within the designated boundaries. Prior to Act No. 555 of 1956, this ancient principle applied with equal force when the sale designated a railroad right of way as a boundary. Such a sale included no property underlying the right of way. The rule had a sound basis: It effectuated the intent of the parties, who had definitely fixed the perimeter of the property by contract.
>
> "The assailed statute expressly applies to conveyances of land made before its enactment. It grants to any person whose rights may be affected one year within which to assert them by filing a suit or a notarial declaration. Absent such action, a conclusive presumption arises that the property underlying the right of way has passed to the purchaser, without regard to possession and despite the contractually designated boundary.
>
> * * *
>
> "Such an alteration disrupts established land tenure, transfers land from persons holding clear titles, and defeats the reasonable expectations of landowners who have relied

> upon the law in effect at the time of conveyance. As retroactively applied, the statute impairs the obligation of contracts and divests vested rights. Consequently, it violates the federal and state constitutions." [citations] *State, Department of Highways v. Tucker*, 170 So. 2d 371, 373-74 (1965).

Also, *Akers v. Baldwin*, 736 South Western Rptr. 2d 294, 310 (1987) (Kentucky Supreme Court);

> "A statute that functions retroactively to determine the meaning of a preexisting deed or lease is constitutionally impermissible because this impairs the obligation of a contract."

And, this Court has said quoting from the court below:

> "The trust deeds are contracts within the meaning of the Federal Constitution. The state cannot by subsequent legislation alter their affect or impair or destroy rights that had vested under them."

This Court agreed saying:

> "The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking effect of the state law under which the excise is claimed. The commonwealth was without authority by subsequent legislation,

> whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them. [citations]" *Coolidge v. Long*, 282 U.S. 582, 583, 595 (1930).

In the case at bar we are not dealing with the passage of a state statute as the cause for impairment. However, we are dealing with an act of a legislative body which should qualify as a "law" within the meaning of the Contract Clause.

The City Council of Del Mar caused to be filed and recorded the Notice of Violation—Illegal Subdivision on January 14, 1991. (Appendix I,19). The City Council is unquestionably a legislative body. Furthermore, it is in this capacity as a legislative body that the Notice of Violation must be recorded with the county recorder.

> " . . . If however, after the owner has presented evidence, the legislative body . . . determines that the property has in fact been illegally divided, the legislative body . . . shall record the notice of violation with the county recorder. " (California Government Code (Map Act) section 66499.36).

This action taken by the City Council is equivalent to the passage by the City of a by-law or ordinance and as such is an exercise of legislative power delegated by the legislature to the city as a political subdivision of the state, having all the force of law within the limits of the municipality so that it may properly be considered as a

law within the meaning of Article I section 10, the Contract Clause.

Following the sale of Lot "U" to the Respondent, the City of Del Mar and the California Coastal Commission approved Lot "U" for development. (Appendix M and N). These approvals were necessary in order for Respondent to build a home on his Lot "U."

But even more significant is the fact that the City of Del Mar in 1987 passed Resolution No. 87-71 stating, inter alia: "The Snakewall Property is comprised of 20 lots of record which can be developed in accordance with the Municipal Code." Lot "U" is one of the lots which comprise the Snakewall Property. (Appendix J).

> "Resolutions adopted by a city council, which have the force of ordinances, are a law within the meaning of the constitutional provision." *Pacific Electric R.Co. v. Los Angeles*, 194 U.S. 112, 119-120 (Cal.1904).

It was this government action combined with the granting of the permit and Design Review Board approval which in essence became part of the contract entered into between Petitioner and Respondent which constituted the sale of Lot "U." Resolution 87-71 was relied upon by Petitioner when he sold Lot "U."

The contention that the laws in force at the time the contract is entered into form part of the contract, within the meaning of the constitutional provision against impairment of contracts, has been a part of American jurisprudence practically since it began.

> "If an act be done under a law, a succeeding legislature cannot undue it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact." *Fletcher v. Pack*, 10 U.S. 87, 135 (1810).

The City Council declared by way of resolution that Lot "U" was a lawfully divided lot. By their act of recording the Notice of Violation upon Lot "U" they in effect repealed Resolution No. 87-71. The contract between Petitioner and Respondent was entered into in reliance upon Resolution No. 87-71. It therefore became part of the contract. No stronger case can be made illustrating such an egregious violation of the Contract Clause than the one presented here.

II.

DEL MAR'S FAILURE TO ISSUE RESPONDENT A CERTIFICATE OF COMPLIANCE ALSO CONSTITUTED A VIOLATION OF THE CONTRACT CLAUSE

Respondent, after purchasing Lot "U," received approval from the City of Del Mar and from the California Coastal Commission to construct a single family residence upon Lot "U." (Appendices M and N).

Pursuant to the California Government Code (Map Act) section 66499.34, this approval had the effect of

declaring that the sale of the property by Petitioner was not in violation of the provisions of the Subdivision Map Act and hence Lot "U" as sold was not illegally subdivided. In pertinent part the section reads:

> "No local agency shall . . . grant any approval necessary to develop any real property which has been divided, or which has resulted from a division, in violation of the provisions of this division or of the provisions of local ordinances . . . .
>
> "The issuance of a . . . grant of approval for development of real property, . . . shall constitute 'real property which has been approved for development,' for the purposes of subdivision (c) of section 66499.35, ..."

The approvals previously mentioned regarding Respondent's construction of a residence on Lot "U" are unquestionably necessary in order to develop Lot "U." Furthermore, the grant of approval means that the real property has been approved for development for purposes of issuing a certificate of compliance.

Government Code section 66499.35 subdivision (c) provides:

> "A certificate of compliance shall be issued for any real property which has been approved for development pursuant to section 66499.34."

This statute confers no discretion upon the local agency to deny a certificate of compliance once grants of approval have been made. Yet, the Del Mar City Council refused to issue the mandatory certificate of compliance to Respondent thereby terminating and annihilating Petitioner's contract with Respondent. In California,

> "If the Board determines that the property complies, it must issue a certificate of compliance so stating." *Findleton v. Board of Supervisors*, 12 Cal.App. 4th 709, 714 (1993).

Additionally, as can be seen from the grant deed and sales documents (Appendix I,15 and 13), Lot "U" was referred to and identified as being depicted on Final Map #1343. (Appendix L). Under California law, this fact alone is sufficient to mandate that the City issue a certificate of compliance with regard to Lot "U."

> "A recorded final map, parcel map, or 'official map' constitutes a certificate of compliance with respect to the parcels it describes." *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 733-34 (1994), fn.1, addressing Government Code section 66499.35(d).

The fact that a certificate of compliance demonstrated that Lot "U" was a legally buildable lot should have been beyond question. Yet, the City of Del Mar utterly failed in its duty under the law of California to fulfill its obligations in this regard and Petitioner suffered irreparable injury.

This failure resulted in countless hours of needless litigation, but more importantly, violated in a most flagrant manner Article I section 10 (Contract Clause) of the Constitution.

> "For purposes of this clause, 'obligation of contract' is defined as the law or duty which binds the parties to perform their agreements, and the contract is impaired when a party is deprived of the benefit of his contract by law." *North Western Natl. Life Ins. Co. v. Jordan*, 447 F.Supp. 856, 859 (D.C. Nevada, 1978).

The land sales contract entered into between Petitioner and Respondent in 1989 was entered into under the protection of not only the laws of California, but under the protection of Municipal Resolution 87-71 declaring Lot "U" to be a legal lot, which was subsequently approved for development by Del Mar in conformity with the resolution.

This Resolution and the permits and approvals given to Respondent were summarily revoked in a most arbitrary and capricious way, all to the detriment of Petitioner.

The following argument will further support Petitioner's claim in this context and go further still in showing how Due Process was ignored throughout the proceedings involving Del Mar's failure to follow and adhere to its own legislation and the clear, unequivocal statutory and case law of the state.

The federal question involved here deals with a Taking of Petitioner's property without Due Process of the law. As the Court will see, not only was Petitioner's real property ordered to be given to Respondents but also substantial sums of money. This was done by the unconstitutional application of statutory law which the federal courts have repeatedly condemned as violative of Due Process.

III.

PETITIONER WAS DENIED DUE PROCESS AS A RESULT OF AN UNCONSTITUTIONAL APPLICATION OF CALIFORNIA CIVIL CODE SECTION 831 AND SECTION 1112 TO THE CALIFORNIA GOVT. CODE (SUBDIVISION MAP ACT) SECTIONS 66410 ET SEQ

The trial court found at summary judgment that Petitioner had violated the provision of the Subdivision Map Act by expressing in the sales documents (escrow instructions) a contrary intent with regard to the passing of one half of the vacated roadway portions adjacent to Lot "U."

Section 831 of the Civil Code provides as follows:

LAND BORDERING ROAD OR STREET

"An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."

Section 1112 of the Civil Code provides as follows:

GRANTS BORDERING HIGHWAYS

> "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."

The trial court applied the presumptions contained in sections 831 and 1112 in such a way that neither Petitioner, nor anyone else, could exercise his right to retain ownership of his property pursuant to statutory authority (sections 831 and 1112), without resubdividing property previously legally subdivided. The trial court's order states:

> "While Defendant claims that a contrary intent could be shown to rebut the presumption and was in fact shown by his elimination of the alley from the conveyance to Plaintiffs this does not excuse Defendant from complying with the Subdivision Map Act." (Appendix F,3).

A reading of the order illustrates that the alleged Map Act violation was the result of the application by the trial court of sections 831 and 1112. Applying the presumptions, the trial court reasoned that the lot depicted on the Final Map should be considered as extending to the center line of the adjacent street/alleys. It was this hypothetical larger lot which was in theory divided by Petitioner when he included the contrary

language in the escrow instructions excluding from passage the alley portion. It was the Courts below interpretation by "connecting" the presumptions of the Civil Code, which are recognized almost everywhere as a general rule of construction or as a rebuttable presumption[1], with the provisions of the Subdivision Map Act which resulted in the erroneous finding against Petitioner.

The finding was affirmed by the Court of Appeal.

> "When Smith sold Lot "U" to Pifer, he retained the street portion, thus subdividing the lot and creating two new units of land . . . he created new parcels, i.e. the street unit which he retained and the non-street unit which he sold . . . . Smith violated the Subdivision Map by retaining the street portion of Lot "U." (Appendix B,40-41).

A reading of the body of the Court of Appeal Opinion shows that the above quote is premised upon the notion that the presumptions of sections 831 and 1112 served to create a 'lot' extending to the center line of the adjoining street, so that when Petitioner showed a "contrary intent" in his deed, as he must do to prevent passage of the alley portions, he thereby "created new parcels." (Appendix B,40-41).

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[1]Whether the rule upon which the grantee relies is expressed as a presumption or not, the results are much the same. See *Boston Five Cent. Say. Bank v. Massachusetts General Hospital*, 255 Mass. 583 at 585 (1926); 152 N.E. 40; Annotation 49 ALR 2d 987 § 2.

The application of the presumptions to an action premised upon an alleged Subdivision Map Act violation violates the Due Process standards established by the federal courts in that the presumptions of sections 831 and 1112 are not "rationally related" to the Subdivision Map Act. This due process violation is further compounded by the fact that the Court of Appeal applied the presumptions in an attempt to interpret the actual subdivision of the property as opposed to the grant of the property from Petitioner to Respondent. The Appellate Court writes, pursuant to the presumptions:

> "As we explained in our earlier opinion, we must presume the lots of the original Snakewall subdivision adjacent to streets and alleys contained within the subdivision extended to the centerline of adjacent streets or alleys since no contrary intent by the *original* subdivider was established."

This belief by the Court is illustrated by the Court's language which comes from language being used by California Courts such as *Baker v. Ramirez,* 190 Cal. App.3d 1123 (1987) (Cited by the Court at Appendix B, 39), wherein the *Baker* Court states:

> "Thus, when lots 172 through 175 were transferred to appellants, the south half of Bravo Street was *included*. (Italics supplied). *Id*. at 1134.

Baker deals with sections 831 and 1112 in the context of a quiet title action. The Court below has erroneously

attached a meaning to the word "include" which is not supportable by case law and which underlies the Due Process claims of Petitioner. The Court below, as the trial court had, utilized the term "include" in much the same way one would utilize the term "merge," i.e., lines of demarcation disappear and alley and lot thereby become one.

> "Include - To have as a component part or parts; imply." *Standard College Dictionary*, Funk & Wagnalls, (1971).

Having a component part is vastly different from having the parts "merge." With component parts the parts are distinguishable which is not the case when a "merging" takes place. Following "merger," everything is indistinguishable.

The Courts below failed to grasp this concept and proceeded to apply the presumptions to the original subdivision of the property instead of the grant deed.

In a case dealing specifically with sections 831 and 1112 the Federal Court for the Ninth Circuit has stated:

> "It is clear to the Court that the provisions of Civil Code §§ 1112 and 831, can *only apply* in the case of a *grant*. . ." (Italics supplied by Court). "The Court is of the opinion . . . that the presumptions of the California Codes [§§ 1112, 831] supra, which *apply only in a conveyance* resulting from a grant. . ." *United States v. 5.324 Acres of Land*, 79 F. Supp. 748 at 761 (1948). (Italics supplied).

Federal decisions have also upheld the rule that the presumption only applies to an interpretation of the deed between the parties and the ascertainment of the intention of the parties, particularly that of the grantor.

> " . . . the terms and circumstances of the grant, . . . unless an intention to retain title to the street clearly appears from the conditions of the conveyance." *Faulks v. Schrider*, 99 Fed.2d 370 at 372 (1938); "presumptions apply and can only apply in the case of a grant . . . ". *United States v. 5.324 Acres of Land*, 79 F.Supp. 748 at 761 (1948); ". . . such title to city lots would not include the land under the adjoining streets." *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 103 F.2d 171, at 174 (1939); "Where land is granted bounding upon a way, public or private, the question whether it extends to the sideline or to the center line of the way, is a question of construction in each particular case, and depends upon the intent of the parties as expressed in the descriptive part of the deed, explained and illustrated by all the other parts . . ." *Banks v. Ogden*, 69 U.S. 57 at 68 (Dec. 1864); Vol. 17 L.Ed. 818.

From the foregoing authorities, and from the rule of law as it exists in this country today, the presumption of ownership to the center of the adjoining way is applied only in the factual situation involving the construction of a deed.

In the case at bar, those presumptions (sections 831 and 1112) were not applied to Petitioner's deed to his grantee, Respondent. Had they been so applied they would have immediately been dispelled by the contrary language found in the escrow instructions. (Appendix I,13).

It is this act which has provided the basis for the Courts below to declare that the act of expressing a contrary intent is unlawful in that it violates the Subdivision Map Act of California.

> "The general rule is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such a way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. *But it is not unlawful to retain such a strip.* If the intention to do so is clear, the contrary presumption must yield." *Cities Service Oil Co. v. Dunlap*, 100 Fed.2d 294 at 297 (1938). (Italics supplied).

It cannot be unlawful to do what the law says you must do in order to avoid having your land pass to another by virtue of the presumption. This is completely out of harmony with our Constitutional system and Due Process.

> "The owner of the village lot is prima facie the owner to the middle of the street." *Banks v. Ogden*, 69 U.S. 57 (Dec. 1864); Vol. 17 L.Ed. 818 at 820, citing additional authorities.

The grantor of the property adjacent to the street, whom must also own the street, then has the burden of proving that his intent was for the grantee not to take, by way of the presumption, the fee in his roadway portion when the lot adjacent thereto was conveyed. The most substantial way in which the grantor can do this is by specifically expressing that intention in the deed itself. *Safwenberg v. Marquez*, 50 C.A.3d 301 (1975); *Machado v. Title Guarantee and Trust Co.*, 15 Cal.2d 180 (1940); *Speer v. Blasker*, 195 Cal. App.2d 155 (1961); *Faulks v. Schrider*, 99 F. 2d 370 at 372 (1938); *Banks v. Ogden*, 69 U.S. 57 at 68 (Dec. 1864), Vol. 17 L.Ed. 818 at 820.

The Courts below treated the presumption more as an independent source of substantive law than as a presumption. A similar situation was found in *Iran v. INS*, 656 F.2d 469 (1981). The Court, commenting upon the Government's application of a presumption to the wrong type of case said:

> "First, there would be no legitimate reason to require proof on the issue of illegal entry in cases not involving that issue. Second, it is apparent that section 1361 was not intended to be an independent source of substantive law. Rather it was intended to create a procedural rule modifying the allocation of proof on the issue of illegal entry. If section 1361 were applied in all deportation cases, it would provide a substantive basis for deportability in cases which do not otherwise involve the question of illegal entry. Third, the application

> of section 1361 in cases in which illegal entry is not an element of the charge of deportability would raise a serious constitutional question. In this circuit, [D]eportation on a charge not presented in the order to show cause, or at the hearing ... offends due process." [Citations] *Id.* at 471.

The presumptions of section 831 and section 1112 are rebuttable and as such were intended to create a procedural rule modifying the allocation of proof on the issue of ownership of the adjacent alley or street portions.

Applying the presumptions in any other way offends Due Process.

IV.

THE HOLDING OF THE COURT OF APPEAL LEAVES THE PERTINENT SUBDIVISION MAP ACT PROVISIONS UNCONSTITUTIONALLY VAGUE AS APPLIED

The two major provisions at issue herein are section 66424 and section 66499.32 of the Subdivision Map Act.

Section 66424 provides in pertinent part:

> "Subdivision is defined as the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county

> assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing . . ."

This statute clearly and concisely lays out what is looked to in order to determine if a subdivision has occurred, that is, the latest equalized county assessment roll. Yet, this significant statutory langauge received short shirft, if any at all, from the lower court. The trial court on the other hand took the approach that hte assessment roll served no other purpose than to conveniently identify the property being divided. (Appendix F,2).

By affirming the trial court decision, the interpretation of section 66424 leaves the application of that statute in a state of virtual inexplicability. Petititoner, nor anyone, could rely on section 66424 to determine if an improper subdivision is about to or has occurred. The statute is therefore unconstitutionally vague as applied.

Similarly Govt. Code (Map Act) section 66499.32 is unconstitutionally vague as applied. Respondent filed his complaint for "rescission" pursuant to Govt. Code 66499.32(a).

However, section 66499.32 also contains an exempting provision found at next to the last paragraph which states:

> "The provisions of this section shall not apply to the conveyance of any parcel of real property identified . . . *in a recorded final map*

> or parcel map, from and after the date of recording." (Italics supplied.)

(See Appendix I,15 illustrating that Lot "U" was identified in the grant deed by reference to Final Map #1343).

The appeals court interpretation and subsequent application to Petitioner of the provision is wholly lacking in understanding. The linchpin for the Court's holding that the exempting provision does not apply to this case is found in the Court's following finding:

> "Smith did not sell the same lots as those depicted on the subdivision map." (Appendix B,44).

This statement creates the unconstitutional vagueness not only with respect to the case at bar but for anyone selling property identified in a recorded Final Map. This encompasses millions of people who own property conveyed to them described by reference to a recorded Final Map.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted. **Alternatively**, the issues of law presented herein, when viewed in the light of the

holding of the Court below may well convince the Court to summarily reverse the Court below and remand the case with appropriate instructions.

Respectfully submitted,

JAMES E. SMITH
Propria Persona

Dated: March 20, 1995

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APPENDIX A

DENIED 12/21/94

Fourth Appellate District, Division One, No. D017742
S043317

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

DELBERT W. PIFER, Appellant

v.

JAMES E. SMITH, Appellant

CITY OF DEL MAR Et Al., Respondents

Petition for review DENIED.

/s/ LUCAS
Chief Justice

APPENDIX B

CIVIL NO. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PIFER, DEL MAR, et al.,

Plaintiffs/Cross-Defendants/Respondents,

v.

JAMES E. SMITH,

Defendant/Cross-Complainant/Appellant.

AND RELATED CROSS-ACTIONS.

Appellate No. D017742

Sup. Ct. No. N51351

PETITION FOR REVIEW

(On Appeal from the Superior Court of San Diego County,
Honorables Ronald L. Johnson and William J. Howatt, Jr.)

James E. Smith
P.O. Box 189003 #106
Coronado, CA 92178-9003
011-526-161-6613 or 6614
In Propria Persona

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
Pifer, et al. v. Smith, Appellate No. D017742; Sup. Ct. No. N51351

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, State of California, in which county the within mentioned mailing occurred, and not a party to the subject matter. My business address is 110 West C Street #700, San Diego, California 92101. I served the attached PETITION FOR REVIEW by United States mail addressed as follows:

Mark A. Potter, Esq.
5090 Shoreham Place, Suite 101
San Diego, CA 92122-5934
For Respondent City (1 copy)

David J. Noonan, Esq.
Theresa M. Brehl, Esq.
Post Kirby Noonan and Sweat
600 West Broadway, Suite 1100
San Diego, CA 92101-3387
For Respondent Pifer (1 copy)

Clerk of the Superior Court
North County Branch
325 So. Melrose Drive
Vista, CA 92083
(1 copy)

Court of Appeal
4th Appellate District
750 B Street, Suite 300
San Diego, CA 92101
(1 copy)

The documents were then placed in sealed envelopes, with postage thereon fully prepaid, and either deposited with the United States Postal Service or placed for collection and mailing by me on November 14, 1994, at

San Diego, California, following ordinary business practices.

There is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I executed this declaration on November 14, 1994, at San Diego, California.

_____

Lisa A. Punzo

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CIVIL NO. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PIFER, DEL MAR, et al.,	) Appellate No.
Plaintiffs/Cross-Defendants/ Respondents,	) D017742
	) Sup. Ct. No. N51351
v.	)
JAMES E. SMITH,	)
Defendant/Cross-Complainant/ Appellant.	)
AND RELATED CROSS-ACTIONS.	)

PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court
of the State of California, San Diego County
Honorables Ronald L. Johnson and William J. Howatt, Jr.

To the Honorable Malcolm Lucas, Chief Justice of California and to the Honorable Associate Justices of the Supreme Court of California:

ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1) Is the approval by the Del Mar Design Review Board, and subsequent affirmance by the City Council, of a "project" (e.g., house) on lot "U" sufficient as a "grant of approval" pursuant to Government Code section 66499.34, thereby requiring the issuance of a certificate of compliance pursuant to Government Code section 66499.35(c)?

2) Is the exempting provision found at the next to the last paragraph of Government Code section 66499.32(b) meant to apply to all conveyances of parcels of real property identified in a recorded final map?

3) To whom in the chain of title is the "contrary intent" component of Civil Code sections 831 and 1112 meant to apply and when?

4) Can a "subdivision" pursuant to Government Code section 66424 be said to have occurred in a situation where the conveyance is claimed to be subject to the presumptions of Civil Code sections 831 and 1112?

STATEMENT OF CASE

A. STATEMENT OF FACTS

From 1910 to 1913, the property, which came to be known as the Snakewall Property, was originally subdivided pursuant to three subdivision maps covering different portions of the property (Augmented Clerk's Transcript -- ACT -- 1206). One of these maps, Map No. 1343 recorded in 1911, shows the portion of the Snakewall Property which includes lot "U" which was sold to Pifer by Smith (Exh. #1, Smith Exhibits).

The real property referred to as lot "U" is depicted on Final Map #1343, Block 12 of Arden Heights Unit No. 4 (ACT 1204:28, 1205:1-13). Lot "U" is depicted as being bordered by Oribia Street (ACT 1206:12-21) (Exh. #1, Smith's Exhibits).

The Snakewall Property consists of twenty (20) subdivided lots and various streets and alleys. Smith purchased the entire Snakewall Property, that is, all twenty lots together with the streets and alleys, in 1977 (Clerk's Transcript -- CT -- 84:12-20).

Given that Smith owned lot "U", as well as the adjoining streets, in fee, he chose not to sell Pifer any property other than lot "U" as it was depicted on Final Map #1343, which showed it as bordering on Oribia Street (Exh. #1, Smith's Exhibits). Therefore, in order to prevent one-half of the adjacent Oribia Street from passing with the conveyance of lot "U", Smith expressed his intention in the sales documents that only lot "U" and not any portion of adjoining Oribia Street would be

conveyed to Pifer. The parties agreed to this, and subsequently Pifer was transferred lot "U" as it was depicted on Final Map #1343 (ACT 1206:12-25).

Following the purchase of the property by Pifer, lot "U" was approved for development by the Del Mar Design Review Board, a conditional use permit (CUP) was approved by the Del Mar Planning Commission, the California Coastal Commission approved lot "U" for development, and the Del Mar City Council affirmed the approval given by the Design Review Board (Smith's Lodged Exhibit DD; Exh. #2 in Evidence).

Thereafter, in spite of all of the above-mentioned approvals, the City Council of Del Mar recorded a notice of violation on January 14, 1991, stating that the lot "U" sold to Pifer was subdivided in violation of the Subdivision Map Act because the portion of the adjoining street had not been conveyed by the seller (ACT 1208:18-26; Smith's Lodged Exhibit ZZ).

B. PROCEDURAL HISTORY

Following the recordation of the notices of violation, Pifer filed his complaint for rescission, as provided for in Government Code section 66499.32(a), on May 15, 1992 (ACT 1152-1172). In response, Smith filed a cross-complaint against Pifer, basing each of the causes of action on the claim that the property was not improperly subdivided in violation of the Subdivision Map Act and that the City of Del Mar had wrongfully recorded the notice of violation (CT 81-162).

Following the filing of a series of motions, the trial

court heard and decided all summary judgment and summary adjudication motions on April 3, 1992 (CT 369-372, 377-378). The trial court granted Pifer's summary adjudication motion (CT 369-372) and denied Smith's summary judgment motion (CT 377-378).

The trial court ruled that, as a matter of law, Smith had illegally subdivided lot "U" by failing to convey the adjacent street portions of Oribia Street (CT 369-372).

Smith appealed the trial court's determination to the Fourth District Court of Appeal, Division One. That court issued a non-published opinion on October 3, 1994, affirming the decision of the trial court (Appendix A).

On October 18, 1994, Smith filed a Petition for Rehearing.

On October 24, 1994, the Court of Appeal filed an Order Modifying the Opinion and denying the Petition for Rehearing with [no change in judgment]. (Appendix B.)

C. GROUNDS FOR REVIEW

Review by this Court is necessary on the primary ground that this case involves a question of general public interest which is likely to reoccur if not decided by this Court.

Each and every day property owners sell property and lots which border streets and roadways. Unless specific and express language is contained in the deed

concerning the transferor's intent not to convey one-half of the adjacent roadway, then that portion of the transferor's property will be "presumed" to pass with the conveyance. (Civil Code §§ 831 and 1112.)

The Fourth District Court of Appeal has, by the present and other holdings, negated the application and meaning of these statutes by holding that the presumptions apply at the time of the original subdivision rather than at the time of conveyance. The court then concludes that the expression of a "contrary intent," as provided for in the statute, runs afoul of the Subdivision Map Act and specifically those provisions dealing with subdivisions and certificates of compliance.

In order for the harmony between the statutes, which the Legislature intended, to continue to exist, it is of paramount importance that this Court review this case.

Factually and legally it is one of first impression in this state and has far-ranging effects which extend into the area of title insurance as well as real property conveyance law.

BRIEF IN SUPPORT OF PETITION FOR REVIEW

ISSUE I
APPROVAL BY THE DESIGN REVIEW BOARD OF A "PROJECT" IS SUFFICIENT AS A GRANT OF APPROVAL FOR PURPOSES OF GOVERNMENT CODE SECTION 66499.34, THEREBY MANDATING ISSUANCE OF A CERTIFICATE OF COMPLIANCE

The Appellate Court, at page 2 of its Order Modifying the Opinion, opines that Appellant did not establish that final approval was given Respondent for his "project" on lot "U". The Court feels that a "final approval" or a building permit is necessary in order for a certificate of compliance to be issued pursuant to Government Code section 66499.35(c) (Modified Opinion, 2).

The Court went to some length "tracking down" Smith's citations in order to either verify or refute his contentions. The citation referenced is case number D017058 RT 322-329, Smith Exhibit DD. (D017058 and D017742 were consolidated at the trial level on March 2, 1992.) These documents include the transcription of the City Council meeting, the Staff Report regarding approval of the project on lot "U", and the minutes of the meeting.

Preliminarily, the approval by the Design Review Board (DRB) of a project on lot "U" was on the agenda for the City Council meeting as the result of an appeal of that approval by one Mr. Piero Ariotti, who claimed that the approved residence violated the provisions of the Del Mar Municipal Code (DMMC) in regard to

allowable stories and height, among other violations. The following quotations from the City Council meeting will show the type of approvals which were given for the construction of a dwelling on lot "U".

From the transcribed portion:

Mayor McMillan: ". . . All right. Item #13 is also an administrative hearing. It's an initial consideration of an appeal of a DRB (Design Review Board) approval for construction of a residence to be built on Lot "U" of the Snakewall property. May we please have a staff report. . . ."

(Exh. DD, 9.)

The Staff Report was then read into the record. Under the headings Planning Commission Review and Project Specific Information, the following appears:

> "Because the project site is located within the Open Space Overlay Zone, the applicant [Respondent] has been required to obtain a Conditional Use Permit (CUP-90-02) for the proposed residence. . . . The Planning Commission unanimously approved CUP-90-02 at their meeting of August 14, 1990."

(Exh. DD, Staff Report, 2.)

> "The applicant [Respondent] has received

> DRB approval to construct a 2,423 square foot, single-family residence, situated over 1,327 square feet of basement area."
>
> (Exh. DD, Staff Report, 4.)

The minutes of the Council meeting reflect the following:

> "Staff report by Planning Director Sandoval indicated that this is an appeal of a decision by the Design Review Board to approve a project located on lot "U" of the Snakewall properties. The project was approved by the Design Review Board at the meeting of September 26, 1990. A letter of appeal was filed by Piero Ariotti, et al.
>
> Council affirmed the decision of the Design Review Board."
>
> (Exh. DD, Minutes, Item #13.)

Additionally, the California Coastal Commission approved lot "U" for development (Modified Opinion, 2). Also, Del Mar Resolution No. 87-71 states, inter alia: "The Snakewall property is comprised of 20 lots of record which can be developed in accordance with the Municipal Code." (Opinion, Factual and Procedural Background, 2, 3.)

Appellant submits that the approval by the Del Mar

City Council and its various agencies of Respondent's residence on lot "U" and the construction of that residence was clearly a sufficient "grant of approval," as that term is used in section 66499.34 of the Government Code. In pertinent part, that section provides:

> "No local agency shall . . . grant any approval necessary to develop any real property which has been divided, or which has resulted from a division, in violation of the provisions of this division or of the provisions of local ordinances. . . ."

> "The issuance of a . . . grant of approval for development of real property, . . . shall constitute 'real property which has been approved for development,' for the purposes of subdivision (c) of section 66499.35,. . . ."

The approvals discussed above are unquestionably necessary to develop lot "U". Furthermore, the grant of approval means that the real property has been approved for development for purposes of issuing a certificate of compliance.

Subdivision (c) of section 66499.35 provides:

> "A certificate of compliance shall be issued for any real property which has been approved for development pursuant to section 66499.34."

This statute confers no discretion upon the local agency to deny a certificate of compliance where compliance is found. "If the board determines that the property complies, it must issue a certificate of compliance so stating." Findleton v. Board of Supervisors (1993) 12 Cal.App.4th 709, 714.

The Appellate Court has erroneously held that a "final approval" was necessary before the City of Del Mar was required to issue Pifer a certificate of compliance pursuant to Government Code section 66499.35(c) (Modified Opinion, 2). This is clearly not the law.

Numerous authorities show that it is the City Council or Board of Supervisors that issues the certificates of compliance. In Kirk v. County of San Luis Obispo (1984) 156 Cal.App.3d 453, landowners in 1979 sought a certificate of compliance (§ 66499.35) from the Board of Supervisors. In Hunt v. County of Shasta (1990) 225 Cal.App.3d 432, the court was faced with a situation in which a county had, by a 2-to-1 non-majority vote of its Board members, denied the petitioners' application for certificates of compliance under section 66499.35 of the Subdivision Map Act. The court concluded that, while the non-majority vote was not a final, binding vote of the Board under section 25005, it was a sufficiently final and determinative "action" to trigger the running of the statute of limitations set forth in section 66499.37.

In Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, the Board of Supervisors adopted resolutions which allowed certificates of compliance to be issued for antiquated lots. The California Coastal Commission certified the Antiquated Subdivision Overlay Ordinance.

The Moreharts applied for a coastal development permit to build a single-family dwelling. The county staff examined the request and made certain recommendations before the request would be approved. The Moreharts unsuccessfully appealed the denial to the Planning Commission and then to the Board of Supervisors.

After examining the procedures used and the various local agencies to which those procedures were applied, it is clear that, in the case at bar, the affirmance by the Del Mar City Council of the Design Review Board's approval was sufficient as a "final" act to establish a grant of approval in conformity with section 66499.34 of the Government Code -- the same as it was a sufficient final act in Hunt, supra, albeit there it was for purposes of the statute of limitations.

Additionally, following the affirmance by the City Council in the present case, the issuance and recording of a certificate of compliance certifying that the subject property complied with the Map Act and related local ordinances (§ 66499.35) could be considered merely a ministerial act.

> "As a rule, 'an act is ministerial when it is the doing of a certain thing that is unqualifiedly required. In other words, where the law prescribes and defines the duties to be performed on a public officer with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial. . . . Where approval of a project requires only

> a ministerial act, without the exercise of discretion, mandamus is available to compel performance of the ministerial act.'"
>
> Findleton v. Board of Supervisors (1993) 12 Cal.App.4th 709, 713.

Findleton makes it clear that in a situation such as the one presented at bar, the Del Mar City Council was mandated to issue a certificate of compliance for lot "U".

Finally, it is submitted that one of the purposes for Design Review Board review is to determine the legality of the subject lot. Government Code section 66418 defines "design" and provides, in pertinent part:

> "'Design' means . . . (5) lot size and configuration;. . . ."

There was no indication whatsoever from the Design Review Board that lot "U" was anything but a legal lot suitable for development of a single-family residence.

The Appellate Court's Modified Opinion, at page 2, as well as Del Mar Resolution No. 87-71, show clearly that lot "U" was approved for development by not only the Del Mar City Council, but also by the California Coastal Commission and by resolution. Government Code section 66418.1 defines "development" as:

> ". . . the uses to which the land which is the subject of a map shall be put, the

> buildings to be constructed on it, and all alterations of the land and construction incident thereto."

Lot "U" was the subject of a final map. As such, the recorded Final Map #1343 constituted a certificate of compliance.

> "A recorded final map, parcel map, or 'official map' constitutes a certificate of compliance with respect to the parcels it describes."
>
> Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 733-34, fn. 1, addressing Government Code section 66499.35(d).

It was determined to be suitable and approved for development by the necessary local governing bodies, and, therefore, a certificate of compliance should have been issued, thereby preventing the filing of the lawsuit which precipitated this litigation. The Court of Appeal was in error in holding that some form of final approval is necessary prior to the issuance of the certificate, although final approval was present in this case.

ISSUE II

GOVERNMENT CODE SECTION 66399.32(b) NEXT TO THE LAST PARAGRAPH APPLIES TO ALL CONVEYANCES OF PARCELS OF REAL PROPERTY IDENTIFIED IN A RECORDED FINAL MAP

The Court of Appeal held that "Smith did not sell the same lot as depicted on the subdivision map." (Opinion, 9, 10.) Had, according to the Court's implicity, lot "U" as depicted on the subdivision map been conveyed, then the exempting provision found at the next to the last paragraph of Government Code section 66499.32(b) would have been applicable, thereby preventing Respondent from maintaining his rescission action brought pursuant to Government Code section 66499.32(a).

Determination of whether the exemption applies is a very simple and straightforward procedure. One need merely compare the language of the deed with the depiction of the subject property on the final map.

The next to the last paragraph of section 66499.32(b) of the Government Code reads:

> "The provisions of this section shall not apply to the conveyance of any parcel of real property identified in a certificate of compliance pursuant to section 66499.35 or identified in a recorded final map or parcel map, from and after the date of recording."

The Appellate Court has interjected into the question of illegal subdivisions the notion that the presumptions of Civil Code sections 831 and 1112 operated in such a fashion so as to make the lot "U" depicted and shown on the final map extend to the centerline of the bordering street.

> "As we have previously explained, Smith sold Pifer only part of lot "U", retaining the street portion of the lot for himself."
>
> (Opinion, 9.)

Recognizing that this Court will have neither the advantage nor the opportunity to view the deed in conjunction with the final map, nevertheless, the solution can be found in the Appellate Court's opinion. The Appellate Court recognizes that lot "U" borders Oribia Street and other public streets (Opinion, 2, fn. 2). The court then goes on to say that "[i]n 1989, Smith sold lot "U" by reference to the 1911 subdivision map to Pifer but excluded the adjacent street." (Opinion, 3.)

Civil Code sections 831 and 1112 both hold that, upon ownership and transfer of land adjacent to a street, the transferee will be presumed to take his transferor's title to the centerline of that adjoining street, unless the transferor expresses a contrary intent in the deed of conveyance.

The Appellate Court openly recognizes that Smith "excluded" from the conveyance to Pifer the adjacent street. Had he not expressed that "contrary" intent in

the deed, then Pifer would have been presumed to have taken title up to the centerline of the adjoining street which was owned by Smith.

The issue, for purposes of the next to the last paragraph of section 66499.32(b), is whether the exempting language of that paragraph addressing the conveyance of any real property identified in a recorded final map excludes from its operation property allegedly presumed to extend to the centerline of an adjoining street. Appellant submits that the presumptions of sections 831 and 1112 are not only incorrectly applied to the facts of this case by the Court of Appeal, but that they do not affect the operation of the next to the last paragraph of section 66499.32(b).

Lot "U" is depicted, as the Appellant has shown and the Appellate Court has observed, as being bordered by Oribia Street, as well as other public streets. The Appellate Court knows this information because the court viewed Final Map #1343 and recognized that lot "U" had as its boundary line the edge of the bordering streets and not the centerline of those same bordering streets. Therefore, the Appellate Court has proposed what amounts to an oxymoron by stating that lot "U" is bordered by surrounding streets, yet contending that lot "U" is depicted as extending to the centerline of those same bordering streets. Both situations cannot exist simultaneously.

As noted, the Appellate Court recognizes, as a result of the depiction on the final map, that lot "U" is <u>bordered</u> by surrounding streets. The court also acknowledges that Smith conveyed lot "U" without any

portion of that bordering street. Therefore, regardless of the correctness or incorrectness of the court's holding with regard to the application of sections 831 and 1112, the indisputable fact is that Smith conveyed the parcel of real property depicted as lot "U" on the final map, that is, lot "U" bordered by Oribia Street and other public streets.

As such, the exempting language of the next to the last paragraph of section 66499.32(b) must apply and exclude Pifer's complaint. Otherwise, final maps will lose any significance they have if a court applies sections 831 and 1112 to any given fact situation. This result clearly cannot be sustained or upheld by this Court.

ISSUE III

THE "CONTRARY INTENT" LANGUAGE OF SECTIONS 831 AND 1112 CAN ONLY APPLY TO A TRANSFEROR SELLING A LOT SEPARATE FROM THE ADJACENT ROAD, WHICH MUST ALSO BE OWNED BY THE TRANSFEROR

The Appellate Court is of the belief that the intent of an original subdivider, not in the act of selling his property but rather in the act of subdividing his property, is capable of overcoming the presumptions of sections 831 and 1112. This is incorrect and clearly not the law. The court stated:

> "As we explained in our earlier opinion, we must presume the lots of the original Snakewall subdivision adjacent to streets and alleys contained within the

> subdivision extended to the centerline of the adjacent streets or alleys since no contrary intent by the original subdivider was established."
>
> (Opinion, 6.)

The presumptions embodied within sections 831 and 1112 were not intended nor have they ever been applied to the construction of a subdivision map in an attempt to determine a subdivider's intent with regard to lots being formed and presumed to extend to the centerline of the laid-out streets.

Rather, the sections are applied to the construction of deeds.

> "Absent evidence of contrary intent, California law sets forth certain presumptions regarding the construction of deeds." [E.g., §§ 831, 1112.]
>
> Bisneatte v. Gourdin (1993) 16 Cal.App.4th 1277, 1281.

Furthermore, the presumptions are only applied to a factual situation wherein the property transferred is adjacent to a street which is designated as a boundary.

> "The presumptions only arise when there is a conveyance of land and within that

> conveyance the street or alley is designated as a monument or boundary."
>
> Augustine and Zarrow, Calif. Real Estate Law and Practice, (1991) Vol. 3, § 81.13; Millyard v. Faus (1968) 268 Cal.App.2d 76, 83.

As the Appellate Court stated, the Snakewall Property was subdivided into twenty lots which also contained streets and alleys. This subdivision was created between 1910 and 1913. Smith purchased the entire Snakewall Property which, although merged at the time of purchase, was subsequently unmerged and the original subdivision was reinstated (Opinion, 2).

Applying the law with regard to when the presumptions of sections 831 and 1112 arise, we see that, in the chain of title, the only conveyance susceptible to having the presumptions applied would be the Smith to Pifer conveyance, since this is the only time in the chain of title when lot "U" was sold and Oribia Street was used as one of its boundaries. Prior to this conveyance, the property was never sold by way of individual lots; rather, it was conveyed both times in toto. Logically, therefore, there would be no need to apply a presumption of ownership to the centerline of an adjoining street if the street was conveyed expressly, along with the lots.

Therefore, it is Smith's intent which should be of concern when looking for a contrary intent, and not that of the original subdivider, as the Appellate Court would have us do.

This holding would put virtually an untenable burden upon any litigant who would be forced to disprove the presumptions of sections 831 and 1112. In conveyances where a deed is used, one looks to the language of the deed to determine whether the transferor expressed his intent that the street adjacent to the lot not pass with the conveyance of the lot. However, to suppose that one can look at a subdivision map and ascertain a subdivider's intent with regard to whether he intended that the lots really extend to the centerline of adjoining streets is nonsensical. The map would clearly speak for itself, and if lot "U" is shown as being bordered by Oribia Street on the final map, then that is the best evidence that the subdivider intended lot "U" be bordered just as it is shown. How could any litigant say or prove the subdivider really had a contrary intent? One could not and fortunately does not have to, since the presumption of ownership to the centerline of an adjacent street applies only to the construction of deeds and only when the transferor sells real property which will have the adjacent street as a boundary. Smith is the only transferor whose intent matters, not the original subdivider.

ISSUE IV

THE SUBDIVISION OF PROPERTY, AS THAT TERM IS DEFINED AT GOVERNMENT CODE SECTION 66424, CANNOT BE APPLIED IN A LEGAL PROCEEDING WHEREIN THE PRESUMPTIONS OF SECTIONS 831 AND 1112 ARE RELIED UPON AS THE BASIS FOR THE ACTION

Government Code section 66424 provides in pertinent part:

> "'Subdivision' is defined as the division by any subdivider of any improved or unimproved land shown on the latest equalized county assessment roll as a unit. . . ."

"A development which does not meet this definition is not covered by the Subdivision Map Act." California Subdivision Map Act Practice, CEB, 1987, p. 20, § 2.1.

Section 831 of the Civil Code provides as follows:

LAND BORDERING ROAD OR STREET

> "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."

Section 1112 of the Civil Code provides as follows:

GRANTS BORDERING HIGHWAYS

> "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant."

The Appellate Court premises its contention that a Subdivision Map Act violation occurred on the theory that sections 831 and 1112 served, at the time of the original subdivision, to extend the lots of the Snakewall Property to the centerline of all adjoining streets and alleys. As was shown in the preceding argument, this proposition is faulty.

However, the fault in the holding is not limited to a misapplication of the presumptions. The faulty reasoning also stems from the fact that the boundaries of a Subdivision Map Act lot and the boundaries of a lot presumed to extend to the centerline of an adjoining street are separate and distinct.

> ". . . we are of the opinion that the word 'lot,' as generally and customarily used, does not include such portion of the street. As was stated by the Supreme Court of Indiana, 'Lot and street are two separate and distinct terms, and have separate and distinct meanings.'"

Earl v. Dutour (1919) 181 Cal. 58, 60.

The "lot" referred to in Dutour is obviously not the type of lot envisioned by the Appellate Court when it states that:

> ". . . we must presume the lots of the original Snakewall Subdivision adjacent to streets and alleys contained within the subdivision extended to the centerline of adjacent streets and alleys. . . ."
>
> (Opinion, 6.)

The Appellate Court is merely "presuming" that the boundaries of lot "U" extend to the centerline. On the other hand, Final Map #1343 depicts lot "U" as being bordered by Oribia Street. The markings on the final map are fixed and ascertainable. Herein lies an illustration of the Appellate Court attempting to mix oil and water, or rather, presumptions and the Subdivision Map Act.

The court is holding that a lot with presumed boundary lines extending to the centerline of the adjacent street is capable of being illegally divided, with the so-called street portion and with its presumed boundary lines being separated from the lot which is bordered by the edge of the street as shown on the final map. This contention is untenable.

> "It is the opinion of this office that the word 'lot' . . . as used in both the Subdivision Law and the Subdivision Map Act refer to a lot of real property."

California Atty. General Opinion (1962) Vol. 39, p. 82, 85.

Presumed boundaries pursuant to sections 831 and 1112 cannot make a "lot" as that term is used in the Subdivision Map Act. The two cannot be made to mix or be interchangeable.

> "This argument points up the significance of the rule limiting the application of section 1112 to a deed describing property as bounded by a street as such. That section does not contemplate the substitution of an assumed boundary for one actually described."
>
> Speer v. Blasker (1961) 195 Cal.App.2d 155, 161.

The Appellate Court is substituting its own idea of an assumed boundary line (pursuant to sections 831 and 1112) for the lot lines actually depicted on the final map showing lot "U" as being bordered by Oribia Street.

Therefore, taking into consideration the term "lot" as it is meant to be used in the Subdivision Map Act, one sees that the definition of "subdivision" at section 66424 does not intend or contemplate the division of a "lot" with "presumed" boundaries. Therefore, the conveyance was not violative of the Subdivision Map Act, and the holding of the Appellate Court indicating otherwise is in error and review should be granted.

CONCLUSION

The issues presented in this petition not only show the error in the Appellate Court's reasoning but in its conclusions, as well. The holdings by the court with regard to these issues not only run contra to established law within the appellate circuits, but impact property owners and purchasers, not to mention title insurance companies, in a very significant way by redefining the role a final map plays within the context of the Subdivision Map Act.

This Court should grant this petition because this case involves questions of general public interest which are likely to reoccur.

Dated: 11/14/94 Respectfully submitted,

James E. Smith, In Propria Persona

APPENDIX "A"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

DELBERT W. PIFER, Plaintiff, Cross-defendant and Appellant, v. JAMES E. SMITH, Defendant, Cross-complainant and Appellant; CITY OF DEL MAR et al., Cross-defendants and Respondents	)D017742)(Super. Ct. No. N51351)

APPEAL from a judgment of the Superior Court of San Diego County, William J. Howatt, Jr., Judge. Affirmed.

James E. Smith appeals a summary judgment in favor of Delbert W. Pifer, the City of Del Mar and the City

Council of Del Mar (City of Del Mar) on Pifer's action for rescission of a sale of a lot from Smith to Pifer based on a violation of the Subdivision Map Act (Gov. Code, § 66410 et seq.) and on Smith's cross-complaint against Pifer and the City of Del Mar for indemnity, fraud, conspiracy and interference with economic and contractual relationships. On appeal, Smith contends rescission was improper because he did not violate the Subdivision Map Act and he had valid equitable defenses to the rescission. Smith also contends the court erred in awarding attorney's fees and damages which constituted prejudgment interest to Pifer. Pifer appeals, contending the court erred in denying an award of prejudgment interest. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a 20-acre property in Del Mar known as the Snakewall property. Between 1910 and 1913, the property was subdivided into 20 lots.[1] The subdivision also contained several streets and alleys which were dedicated to the county for public use. Lot U bordered

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[1]The subdivision of the Snakewall property was accomplished through three subdivision maps which not only created the 20 lots within the Snakewall property but also other lots in Del Mar.
For the sake of convenience, we use the singular "subdivision" when referring to the 20 lots within the Snakewall property.

a street.[2]

In 1925, the county vacated and abandoned the streets and alleys contained in the Snakewall subdivision.

Smith bought the property in 1977. At the time he bought the property, the 20 lots had been merged into one parcel. The property was unmerged in 1985 and the original subdivision was 1987, the City of Del Mar passed a resolution stating, inter alia: "The Snakewall Property is comprised of 20 lots of record which can be developed in accordance with the Municipal Code." (City of Del Mar Resolution No. 87-71.)

In 1989, Smith sold lot U by reference to the 1911 subdivision map to Pifer but excluded the adjacent street.

In 1991, the City of Del Mar determined Smith had illegally subdivided lot U by retaining the alley portion of the lot, voted to record notice of violation against the property and prohibited Pifer from developing the lot.

Pifer filed a complaint seeking, inter alia rescission, restitution and damages based on Smith's selling the property in violation of the Subdivision Map Act. Smith cross-complained against Pifer alleging causes of action for indemnity, fraud, breach of the covenant of good faith and fair dealing, conspiracy and declaratory relief.

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[2]Lot U bordered Oribia Street. Lot U also abuts public streets which are not at issue here.

Smith also cross-complained against the City of Del Mar for indemnity, fraud, conspiracy, negligent or intentional interference with economic relationship and declaratory relief. The court granted judgment on the pleadings on Smith's complaint in favor of Pifer and the City of Del Mar on the causes of actions for indemnity, fraud, breach of the covenant of good faith and fair dealing and conspiracy.

All parties filed a series of motions, counter-motions and joinders for summary judgment or summary adjudication. Before the motions were heard, the case was consolidated with Roulette, et al. v. Smith (Super. Ct. No. N49451) which involved Smith's sale to other buyers of lots H, I and J in the Snakewall property without the adjacent alleys.

The trial court decided the summary adjudication and judgment motions adversely to Smith. The court determined Smith' had subdivided the property in violation of the Subdivision Map Act and therefore Smith had no cause of action against the City of Del Mar for recording a notice of violation and Pifer was entitled to rescission and damages. The court also granted Pifer attorneys' fees but denied his request for prejudgment interest.

DISCUSSION

I

Subdivision Map Act Violation

Smith makes numerous challenges to the determination he violated the Subdivision Map Act. He raised and we

disposed of these same challenges in Roulette v. Smith (June 9, 1993) D017058 (nonpub. opn.) and Smith v. City of Del Mar (Apr. 27, 1993)' D015814 (nonpub. opn.) and continue to find the reasoning in those cases to be persuasive.

As we explained earlier, California law presumes a person owning land adjacent to a road owns the land to the center of the road unless the contrary is shown. (Civ. Code, § 831.) Further, California law presumes when a person transfers land adjacent to a road, the seller transfers title to the center of a road unless the grant shows a different intent. (Civ. Code, § 1112.) Thus, under the presumption, a person who buys a lot adjacent to a road by reference to a recorded map generally acquires title to the centerline of the adjoining street. (*Neff v. Ernst* (1957) 48 Cal.2d 628, 635; *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1132.)

Generally, the property owner retains title to the centerline of a street even when the street is dedicated to the government because the government generally acquires only an easement over the roadway. (*Safwenberg v. Marquez* (1975) 50 Cal.App.3d 301, 307-308; *Baker v. Ramirez, supra*, 190 Cal.App.3d 1123, 1132.) If the government vacates or abandons the street, then ownership, use and possession of the street generally reverts to the adjacent property owners. (*Baker v. Ramirez, supra*, 190 Cal.App.3d 1123, 1132; *Severo v. Pacheco* (1946) 75 Cal.App. 2d 30, 34.)

Under the Subdivision Map Act, before an owner may legally subdivide a piece of property for the purpose of sale, he must obtain approval of either a

subdivision or parcel map. (See Gov. Code, §§ 66426, 66428.) Certain lot line adjustments, where no new lots are created, do not require filing a parcel or subdivision map. (Gov. Code, § 66412.) The City of Del Mar has adopted procedures for the approval of lot line adjustments.

(Del Mar City Ordinance, § 24.70.010.)

The Subdivision Map Act prohibits transactions in violation of the Act. (Gov. Code, § 66499.30.) When a local agency knows of a Subdivision Map Act violation, after providing the property owner with notice and an opportunity for a hearing and making a determination a violation has occurred, the local agency is required to file a notice of violation which "when recorded, shall be deemed to be constructive notice of the violation to all successors in interest in such property." (Gov. Code, § 66499.36.)

As we explained in our earlier opinion, we must presume the lots of the original Snakewall subdivision adjacent to streets and alleys contained within the subdivision extended to the centerline of adjacent streets or alleys since no contrary intent by the original subdivider was established. When the county vacated and abandoned the Snakewall streets and alleys in 1925, that portion of lot U which was subject to the county's public easement (i.e., one-half of the adjacent street) reverted to lot U. (See e.g., *Pilkington v. Fausone, supra,* 11 Cal.App.3d 349, 351-352.)

When Smith sold lot U to Pifer, he retained the street portion, thus subdividing the lot and creating two

new units of land. These were not mere lot line adjustments, exempted from the requirement of filing a parcel or subdivision map because Smith did not merely adjust the lot lines among the lots creating no new parcels; he created new parcels, i.e., the street unit which he retained and the non-street unit which he sold. Smith further violated the Subdivision Map Act by failing to obtain government approval for his changes in the lot lines. (§ 66412, subd.(d).)

Smith violated the Subdivision Map Act by retaining the street portion of lot U. The City of Del Mar properly recorded a notice of violation against lot U.[3]

II

Rescission Remedy

We have already addressed the propriety of remedy of rescission in Roulette v. Smith (June 9, 1993) D017058 (nonpub. opn.) (hereafter Roulette #1.) We adopt the same reasoning here.

As we explained in Roulette #1, the Subdivision Map Act is designed to restrict the activities of a subdivider and thus its prohibitions and sanctions run to the seller,

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[3]There is no separation of powers problem in this case. Neither this court nor the trial court established new lot boundaries, rather we legally determined the pre-existing boundaries of the lot as reflected in the subdivision map and determined that Smith newly subdivided the lots by retaining the alley portions.

not the buyer; the Subdivision Map Act does not require innocent purchasers to suffer for violations committed by his grantor or predecessors. (*Keizer v. Adams* (1970) 2 Cal.3d 976, 979; *Stell v. Jay Hales Development Co.* (1992) 11 Cal.App.4th 1214, 1228.) The Subdivision Map Act provides a sale or deed which has resulted from a Subdivision Map Act violation "is voidable at the sole option of the grantee" (Gov. Code, § 66499.32, subd.(a)) and gives the purchaser a right to file an action "to recover any damages he has suffered by reason of such division of property" (Gov. Code, § 66499.32, subd. (b)). In other words, the Subdivision Map Act permits a buyer of property which the seller illegally subdivided to sue for rescission and restitution.

Smith, as he did in Roulette #1, argues summary judgement was improper because he had valid equitable defenses and there were material issues of fact. As in Roulette #1, Smith's argument appears to be based on evidence of Pifer's refusal to accept a conditional certificate of compliance and insistence the City of Del Mar file notices of violation and the fact Smith tendered a deed to the alley portion in dispute which would have cured the violation.

Smith's contention Pifer "insisted" the City of Del Mar file the notice of violation mischaracterizes the evidence. The record shows Pifer attempted to obtain a certificate from the City of Del Mar declaring his lot was a legal lot created in compliance with the Subdivision Map Act and acceded to the City of Del Mar's filing a notice of violation only when it became apparent the City of Del Mar had determined the lots were illegally subdivided.

Second, as to Smith's contentions Pifer is barred from seeking rescission because he refused to accept a conditional certificate of compliance or to accept Smith's tender of the alley portions Smith had retained, we note this is essentially an argument Pifer had an obligation to attempt to cure the defect in his illegally subdivided lot. As we explained in Roulette #1, under the Subdivision Map Act, while a buyer of an illegally subdivided lot may seek to cure a defect in a lot by applying for a certificate of compliance or approval for a division of the property or by obtaining from the grantor the remainder of the property, the Subdivision Map Act does not impose a requirement on an innocent purchaser, such as Pifer, to cure the defect. Instead, the Subdivision Map Act gives the buyer an unequivocal right to void a conveyance of illegally subdivided property. Government Code section 66499.32, subdivision (a), provides a deed to an illegally subdivided property "is voidable *at the sole option of the grantee [or] buyer.*" Smith would negate this provision by denying the buyer the option of voiding the conveyance whenever the grantor elected to attempt to cure the defect. In other words, Smith would give control over the option of voiding the deed to the grantor, a scenario which is directly contrary to the statutory scheme.

Smith also contends Pifer was not entitled to void his deed under the next to last paragraph of Government Code section 66499.32, subdivision (b) providing, "The provisions of this section shall not apply to the conveyance of any parcel of real property identified in a certificate of compliance filed pursuant to Section 66499.35 or identified in a recorded final map or parcel

map, from and after the date of recording." Smith contends Pifer possessed a certificate of compliance under Government Code section 66499.35, subdivision (d).

Government Code section 66499.35, subdivision (d) provides: "A recorded final map or parcel map shall constitute a certificate of compliance with respect to the parcels of real property described therein."

This argument is but a variation of Smith's argument he did not violate the Subdivision Map Act because he sold the lots as show on the subdivision map. As we have previously explained, Smith sold Pifer only part of lot U, retaining the street portion of the lot for himself; Smith did not sell the same lot as depicted on the subdivision map. Therefore, Government Code section 66499.35, subdivision (d) does not apply.[4]

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[4]As in Roulette #1, Smith generally asserts there were triable issues of fact as to whether waiver or estoppel applied but makes no further argument on these issues, neither citing evidence or authorities to support his claim. "Where a point is merely asserted . . . without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court. [Citation.]" (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647; *Jimmy Swaggart Ministries v. State Bd. of Equalization* (1988) 204 Cal.App.3d 1269, 1294.)

III

Attorney Fees

After the order granting summary judgment, Pifer sought attorney fees of $81,748.25 and costs of $6,570.21. The trial court issued a statement of decision in response to Smith's request.[5] The court awarded $60,000 in attorney fees and costs pursuant to Civil Code section 1717 to Pifer based on the attorney fees provisions in the promissory note and trust deed.

The court stated:

"While this matter involved a singular issue relating to the application of the Subdivision Map Act to the transactions by and between the plaintiffs and defendant, this defendant, in an exercise of his right to litigate the issue, has engaged in a redundant

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[5]Smith also contends the statement of decision by the court was inadequate and therefore we should remand so the trial court can give its reasoning. Remand is not necessary because the court adequately explained it was awarding attorney's fees pursuant to Civil Code section 1717 based on attorney fee provisions in the promissory note and trust deed. The trial court also provided an explanation for the amount of fees. Likewise, there is no merit to Smith's argument we should remand for an evidentiary hearing on the amount of the attorney's fees. Smith has already been provided with ample opportunities for challenging the amount of fees sought.

exercise. Defendant has inundated the Court and counsel with a plethora of paper reiterating the same issues and arguments. This action while not frivolous is certainly oppressive and served only to evoke likewise increscent response.

"Pifer seeks $88,318.46 in attorney fees and costs . . . . Certainly two-thirds of these fees and costs can be directly attributable to the pleomastic [sic] efforts of defendant which were unnecessary to the seminal issues of this litigation. Pifer is awarded attorney fees and costs in the amount of $60,000."

Smith makes numerous challenges to the attorney fee award. We rejected these same arguments in *Roulette v. Smith* (*Roulette #2*) (June 26, 1994) D018419 (nonpub. opn.). We continue to find that reasoning persuasive.

A. Fees were Properly Awarded Under Civil Code Section 1717

Smith contends the court erred in awarding attorney fees to Pifer pursuant to Civil Code section 1717.

"A party is generally precluded from recovery of attorney's fees, except where attorney's fees are specifically authorized by agreement or statute. [Citation.]" (*Smith v. Krueger* (1983) 150 Cal.App.3d 752, 756.) Section 1717 applies to contractual attorney fees provisions:

"In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be

awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civ. Code, § 1717, subd. (a).)

"Section 1717 was enacted to establish mutuality of remedy where contractual provision makes recovery of attorney's fees available for only one party [citations], and to prevent oppressive use of one-sided attorney's fees provisions. [Citations.]" (*Reynolds Metals Co. v. Aiperson* (1979) 25 Cal.3d 124, 128, citations omitted.)

Here, the promissory note from Pifer in pertinent part provides:

"If action be instituted on this Note, the undersigned promises to pay such sum as the Court may fix as attorney's fees."

Smith contends the attorney fee provision in the promissory note cannot provide a basis for awarding attorney fees to Pifer. He asserts the only event which could trigger an award of attorney fees under the provision was if he instituted an action on the note. He claims if he instituted an action on the note the anti-deficiency legislation of Code of Civil Procedure sections 580b or 580d which require the holder of such a note to look only to the security to satisfy the debt would preclude him from recovering attorney fees. He argues since Civil Code section 1717 is intended to be a "mirror image" statute (i.e., providing attorney fees to

whichever party prevails regardless of limits in the contract language), if he would not recover attorney fees, then Pifer also should be precluded from recovering attorney fees.

The premise of Smith's argument, i.e., that anti-deficiency legislation precludes an award of attorney fees to the holder of non-recourse purchase money note who has foreclosed on the property through exercising a private right of sale, has been rejected by the courts. (See *Flynn v. Page* (1990) 218 Cal.App.3d 342, 349; *Passanisi v. Merit-McBride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1509 [A "judgment for attorney's fees and costs is entirely independent of the problems encompassed by antideficiency legislation."].)

Smith's argument is also flawed since it presupposes the only action that could be instituted on the note would be one related to foreclosure (the anti-deficiency legislation relates to nonjudicial foreclosures). It is possible other disputes could arise with a nonrecourse purchase money promissory note. For example, there might be a dispute between the holder of the note and the promises as to the validity of the note or the amount of the note which might lead the holder to institute an action on the note to enforce it without instituting an action for foreclosure.

Here, the action was clearly "instituted on [these] notes" since the primary remedy Pifer sought was cancellation of the note.

B. Attorney Fees Are Not Barred Due to an Illegal Contract

Smith contends Pifer is not entitled to attorney fees because his action established the contract was illegal.

A contract is unlawful when it is "[c]ontrary to an express provision of law; [c]ontrary to the policy of express law, though not expressly prohibited; or, [o]therwise contrary to good morals." (Civ. Code, § 1667, paragraphs and numbers omitted.)

The consideration for a contract must be lawful. (Civ. Code, § 1608.) "[I]f the contract has several distinct objects, of which at least one is lawful, the contract is valid and enforceable as to the lawful object, provided that this is clearly severable from the rest. [Citations.]" (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts (hereafter Witkin), § 431, p. 387.)

The court in *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 838-839, explained:

"'[C]ourts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts. This concern has been graphically articulated by the California Supreme Court as follows: "It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths,. . . While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful

considerations, and courts so recognizing have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare. 'The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt'. . . . 'No court ought to refuse its aid to enforce a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.'"" (Citations omitted.)

When neither party can enforce the contract because it is illegal, then the attorney fee provision in the contract will not be enforced and the mutuality provisions of Civil Code section 1717 do not come into play. (*Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, 707, disapproved on another ground in *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 496.) Thus, when a party successfully defends an action on a contract on the ground the contract violates public policy and is illegal, the party may not recover attorney fees. (*Bovard v. American Horse Enterprises, Inc., supra,* 201 Cal.App.3d 832, 843; *Gelfen v. Moss* (1975) 53 Cal.App.3d 215, 227; see also *Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 76.)

However, when a party successfully defends a contract action not on the theory the contract was invalid or

unenforceable but on some ground other than illegality, the courts have held such an action is "on the contract" and attorney fees may be awarded. (*Care Constr., Inc. v. Century Convalescent Centers, Inc., supra,* 54 Cal.App.3d 701, 706-707.) In particular, a number of cases have held that a party obtaining a rescission of a contract may be entitled to attorney fees even though the rescission action extinguishes the contract. (See *Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 377-379 [rescission of motor vehicle conditional sale contract obtained based on major defects in vehicle].) This rule has been specifically applied to real estate contracts. (See *Hastings v. Matlock* (1985) 171 Cal.App.3d 826, 841 [rescission of a written land sale agreement obtained based on structural and cosmetic defects as well as Uniform Building Code violations in improvements made by sellers pursuant to contract], *Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal.App.3d 447, 463 [rescission of trust deed and promissory note obtained based on intentional and false misrepresentations by sellers].) In these cases, had the sellers prevailed (i.e., established the contract should be enforced rather than rescinded), the sellers would have been entitled to attorney fees and thus the mutuality provisions of Civil Code section 1717 come into play so as to provide attorney fees to the rescinding party.

Here, Pifer sought rescission of the agreement to purchase the property based on Smith's violation of the Subdivision Map Act. Smith points out Pifer argued he was entitled attorney fees under the private attorney general doctrine on the ground preventing the sale of illegally subdivided property was conferred an important benefit on the public. He argues, thus, his claim for

rescission was based on illegality and attorney fees should be denied. We find this argument unpersuasive.

Initially, we note, the Subdivision Map Act declares sales involving illegally subdivided property not void but voidable at the buyer's option. (Gov. Code, § 66499.32, subd. (a).) The Subdivision Map Act also expressly permits buyers of improperly subdivided property to obtain damages from the seller. (Gov. Code, § 66499.32.) If the Legislature had intended.contracts for the sale of improperly subdivided property to be held illegal, then they would have declared such sales void, not merely voidable. Further, an order of rescission is inconsistent with a determination a contract is illegal; where a contract is held illegal, the law will not aid either party to the contract but will leave them where it finds them. (See *Wise v. Radis* (1925) 74 Cal.App. 765, 774; *Mansfield v. Hyde* (1952) 112 Cal.App.2d 133, 139; *Owens v. Haslett* (1950) 98 Cal.App.2d 829, 833.)

No reversal is merited on the ground the court improperly awarded attorney fees pursuant to an illegal contract.

IV

Prejudgment Interest

Pifer contends the court improperly refused to award prejudgment interest pursuant to Civil Code section 3287, subdivision (a).

Civil Code section 3287, subdivision (a) provides:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state . . . .

"The policy underlying authorization of an award of prejudgment interest is to compensate the injured party -- to make that party whole for the accrual of wealth which could have been produced during the period of loss. [Citation.]" (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1790; *Segura v. McBride* (1992) 5 Cal.App.4th 1028, 1041.)

"The test for recovery of prejudgment interest under section 3287, subdivision (a) is whether 'defendant actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount.' [Citation.]" (*Cassinos v. Union Oil Co., supra,* 14 Cal.App.4th 1770, 1789; *Hartford Accident & Indemnity Co. v. Sequoia Ins. Co.* (1989) 211 Cal.App.3d 1285, 1307.) "The statute does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, 'depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor.' [Citations.]" (Fireman's Fund Ins. Co. v. Allstate Ins. Co. (1991) 234 Cal.App.3d 1154, 1173.) Thus, "[w]here

the amount of damages cannot be resolved except by account, verdict or judgment, interest prior to judgment is not allowable. [Citation.]" (*Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App. 4th 565, 573.)

Relevant to the determination the damages were certain or capable of being calculated is the lack of a dispute about the amount of damages. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 799.) The lack of disparity between the amount claimed in the complaint and the final judgment is also a factor tending to show the damages were certain or capable of calculation. (*Stein v. Southern Cal. Edison Co., supra,* 7 Cal.App.4th 565, 573; *Credit Managers' Assn. v. Brubaker* (1991) 233 Cal.App.3d 1587, 1595.)

Pifer sought damages totaling $320,076.31 which included his down payment ($50,000), interest on money he borrowed for the down payment ($17,500), closing costs ($849), payments made to Smith using an advance on a credit line ($52,500), interest on the credit line $12,112.50) and property taxes ($2,114.81). The amount of damages also included $185,000 for the increase in fair market value to the property due to the removal of a concrete reservoir, preparing the site and obtaining a design and approval for a residence.

Pifer alternatively set forth in a declaration the costs for removing the reservoir, preparing the site, designing the residence and obtaining approvals in case the court was disinclined to award the $185,000 for the increased fair market value of the property. These costs amounted to $33,554.47.

The court awarded Pifer damages of $168,630.78. This amount reflected the court's decision not to award the claimed increase in the fair market value of the property ($185,000) but to limit Pifer's recovery by awarding the costs of the site preparation and improvements to the property.

The record here indicates this is not a case where the damages were certain or capable of calculation prior to the judgment. While most of the claimed damages were certain or capable of calculation (e.g., the principal and interest payments, property taxes), the total amount of damages was not liquidated. Pifer sought an additional amount for the claimed increase in the fair market value of the property; an amount not readily capable of calculation. Therefore, the court was not compelled to award prejudgment interest pursuant to Civil Code section 3287.

Smith contends that since the court ruled Pifer was not entitled to prejudgment interest, the court erred in ordering Smith to pay the amount of interest Pifer paid (before the judgment) for credit line advances Pifer obtained to pay for his down payment, principle payments and improvement expenditures. There is no merit to this argument. Prejudgment interest is an award of interest on the damages payable by the person found liable for the damages, in this case that would be Smith (had the court awarded prejudgment interest). Pifer's interest payments on the credit line advances represent payments to third parties and are properly includable as damages; they do not represent an award of prejudgment interest.

DISPOSITION

The judgment is affirmed. Each side to bear their own costs on appeal.

/s/
KREMER, P.J.

WE CONCUR:

/s/
BENJE, J.

/s/
HUFFMAN, J.

APPENDIX "B"

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

DELBERT W. PIFER, Plaintiff, Cross-Defendant and Appellant, v. JAMES E. SMITH Defendant, Cross-Complainant and Appellant; CITY OF DEL MAR et al., Cross-defendants and Respondents	)D017742)))ORDER)MODIFYING)OPINION AND)DENYING)PETITION FOR)REHEARING))[NO CHANGE IN) JUDGMENT])(Super.Ct.No.) N51351))))

THE COURT:

The opinion filed on October 3, 1994 is modified to add a footnote at the end of the second full paragraph on page four.

This footnote reads:

In a petition for reheating, Smith argues the City of Del Mar was required to issue a certificate of compliance with the Subdivision Map Act for Lot U pursuant to Government Code section 66499.35, subdivision (c) because the City and the Coastal Commission had given Pifer approval to build a residence on lot U. Initially, we note Smith merely referred in passing to this matter in the Fact section of his opening brief on appeal; he did not argue the matter in the argument section of either his opening or reply brief. His failure to argue the issue may be deemed a waiver. Further, after tracking down Smith's citations (contained in a different appellate record), we find they do not support his contention "the City of Del Mar gave its final approval for Mr. Pifer's dwelling on his legal lot U." !(Pet. 2)! The record shows only that the City of Del Mar's Design Review Board approved the design of Pifer's residence and that the Coastal Commission gave its approval.! (D017058 RT 322-329, Smith Exh. DD)! The record does not show that Pifer obtained final approval or a building permit from the City of Del Mar to support his contention the City of Del Mar was required to issue Pifer a certificate of compliance pursuant to Government code section 66499.35, subdivision (c).

In his petition, Smith raises other arguments restating arguments he has already raised and we have found unpersuasive.

Addition of this footnote will require the renumbering of the remaining footnotes.

As modified, the petition for rehearing is denied.

There is no change in the judgment.

/s/
KREMER, P.J.

Copies to: All parties

APPENDIX C

CIVIL NO.S043317

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DELBERT W. PIFER,

Plaintiff and Respondent/Appellant,

v.

JAMES E. SMITH,

Defendant and Appellant/Respondent.

ANSWER TO PETITION FOR REVIEW

(Appeal from the Superior Court of San Diego County
Hon. Ronald L. Johnson and William J. Howatt, Jr., Judges)

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CIVIL NO. S043317

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DELBERT W. PIFER, an individual,

Plaintiff and Respondent/Appellant,

v.

JAMES E. SMITH, an individual, and DOES 1 through 20 inclusive,

Defendant and Appellant/Respondent.

ANSWER TO PETITION FOR REVIEW

(Appeal from the Superior Court of San Diego County
Hon. Ronald L. Johnson and William J. Howatt, Jr., Judges)

I.

INTRODUCTION

The Petition of Defendant/Appellant James E. Smith ("Smith") shows great persistence (or stubbornness), but no merit. Unwilling to accept this Court's prior refusal to review the Subdivision Map Act issues decided against him by two different trial judges and the Court of Appeal (in three separate actions[1]), Smith petitions this Court for the third time for review of the same issues.[2] Again, he fails to demonstrate any need for review of these issues. He identifies no conflict among the courts of appeal. The San Diego Superior Court and the Fourth District Court of Appeal applied established principles of law in this case. Smith's present petition on the Map Act issues should therefore be denied, once again.

Appellant's purported "issues" are illogical and attempt to create "issues" where none exist. Smith's frivolous "issue" and argument that the City of Del Mar was required to provide a Certificate of Compliance for a lot that violated the Subdivision Map Act, which argument was not timely raised before the Superior

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[1]This action, before the Fourth District Court of Appeal as Case No. D017742; the Roulette v. Smith matter, case no. S033948; and the Smith v. City of Del Mar matter ("the Mandamus Action"), case no. S033083.

[2]Review has already been denied in the related Roulette action and Mandamus Action numbered S033948 and S033083.

Court or Court of Appeal, simply does not make sense and provides absolutely no basis for review by this Court.

Finally, Smith's Petition for Review is untimely. The Fourth District Court of Appeal filed its Opinion on October 3, 1994, and it was final on November 2, 1994, such that any Petition for Review needed to be filed within ten days after that decision became final. Smith's Petition was filed on November 14, 1994, twelve days after the Appellate Court's decision became final.

II.

SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

Smith was the owner of certain undeveloped, subdivided lots in the City of Del Mar which included portions of adjacent streets and alleys. However, when he sold one of those lots, Lot "U", to Plaintiff/Respondent Delbert W. Pifer ("Pifer") in 1989, Smith retained the adjacent Gatun Street (sometimes referred to by Smith as "Oribia Street") portion for himself without obtaining a lot line adjustment or otherwise complying with the Subdivision Map Act. The City of Del Mar (the "City") determined that this action by Smith violated the Subdivision Map Act, and issued a Notice of Violation on the Lot. Pifer, then unable to legally improve, convey, refinance or otherwise Lot "U", filed this action against Smith to obtain his statutory remedies of rescission and damages. Cal. Gov't Code 66499.32(a) and (b). Smith cross-complained against the City, and also filed a

separate Writ of Mandamus action against the City (the "Mandamus Action"), challenging its determination. Pifer was not a party to the Mandamus Action.

In separate proceedings in the three actions,[3] two different trial court judges reviewed the Map Act issues, decided Smith had violated that Act, and entered judgments against him. Those decisions were all upheld by the Fourth District Court of Appeal in three unpublished opinions. Smith has already sought review by this Court of the Map Act issues in the Mandamus Action and in the other action by buyers other than Pifer (the "Roulette Action"); both these petitions were denied. (Case Nos. S033083 and S033948.) Smith now petitions this Court for review of the same Map Act issues.

III.

SMITH'S PETITION FOR REVIEW SHOULD BE DENIED

Smith claims that review by this Court is warranted because "this case involves a question of general public interest which is likely to reoccur if not decided by this Court." (Smith Petition for Review ("Smith Petition") p. 4.)) Smith then proceeds to argue that he believes the Fourth District Court of Appeals improperly decided this case in its unpublished opinions. Not only is it obvious from his brief and the record below, but, in fact, this Court has already determined, that there simply is no legitimate ground, and no need, for review

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[3]See Footnote 1.

in this case. Smith is merely disgruntled with the lower Court's rulings.

A. THIS COURT HAS ALREADY CORRECTLY REFUSED TO REVIEW THE SUBDIVISION MAP ACT ISSUES PRESENTED BY SMITH

This Court has already considered and rejected review of "issues" (2), (3) and (4) listed in Smith's current petition. While his description of the issues has changed somewhat, Smith's basic argument in this petition is the same as in his prior petitions in the Mandamus Action and the Roulette Action; that the Court of Appeal erred in holding that he violated the Map Act when he sold Pifer Lot "U" while retaining the adjacent Gatun street. Smith gives no reason for this Court to reverse its decisions on the Mandamus Action and Roulette Action petitions and grant review in this case of the same issues previously rejected.

Smith does not, and indeed cannot, argue that there is any conflict between the courts of appeal on the issues raised in this action. The Court of Appeal in this action applied established, consistent authority to determine those issues. Smith's dissatisfaction with the particular result in these cases does not require or justify review by this Court.

Smith in his petition attempts to argue the merits of the Map Act issues. However, given his failure to demonstrate any need for review of these issues, this Court need not consider that argument. All of Smith's arguments were fully argued and considered below in

three separate actions, by two different trial judges and the Court of Appeal. There is no need for further review by this Court.

B. SMITH'S ARGUMENT THAT THE CITY OF DEL MAR WAS REQUIRED TO ISSUE A CERTIFICATE OF COMPLIANCE IS UNTIMELY AND FRIVOLOUS

Preliminarily, Smith's petition on the "Certificate of Compliance" issue (Smith's "Issue (1)") should be denied on procedural grounds. As a matter of policy, this Court normally will not consider "any issue that could have been but was not timely raised in the briefs in the Court of Appeal." Cal. Rule of Ct. 29(b) (1). The "Certificate of Compliance" issue was not raised before the Court of Appeal until Smith's Petition for Rehearing. It is apparently being raised now in this Court in an untimely, last-ditch effort to invent a bogus basis for review. This Court should refuse to consider this new argument which was not timely raised in the Court of Appeal.

Substantively, Smith's "Certificate of Compliance" argument is patently ridiculous. This is evident in the Fourth District Court of Appeal's response to this untimely issue, raised for the first time in Smith's Petition for Rehearing. In the Fourth District Court of Appeal's Order Modifying Opinion and Denying Petition for Rehearing, the Appellate Court stated:

> Initially, we note Smith merely referred in passing to this matter in the Fact section of

his opening brief on appeal; he did not argue the matter in the argument section of either his opening or reply brief. His failure to argue the issue may be deemed a waiver. Further, after tracking down Smith's citations (contained in a different appellate record), we find they do not support his contention "the City of Del Mar gave its final approval for Mr. Pifer's on his legal lot U."! (Pet. 2)! The records shows only that the City of Del Mar's Design Review Board approved the design of Pifer's residence and that the Coastal Commission gave its approval.! (D017058 RT 322-329, Smith Exh. DD)! The record does not show that Pifer obtained final approval or a building permit from the City of Del Mar to support his contention the City of Del Mar was required to issue Pifer a certificate of compliance pursuant to Government Code section 66499.35, subdivision (c).

IV.

SMITH'S PETITION FOR REVIEW IS UNTIMELY

California Rule of Court, Rule 28(b) provides that "[a] party seeking review must serve and file a petition within 10 days after the decision of the Court of Appeal becomes final as to that court." Therefore, Smith was required to file his petition before November 12, 1994, which was the tenth day after the Fourth District Court of Appeal's October 3, 1994 opinion became final (on November 2, 1994). On this basis alone, review should

be denied.

V.

CONCLUSION

Smith's untimely petition completely fails to demonstrate any reason for review of the Court of Appeal's decision in this action. This Court has already declined on two occasions to review the Subdivision Map Act issues raised again by Smith. There is no conflict on these issues among the Courts of Appeal. The Court of Appeal decision in this action was based on established authority. Furthermore, Smith's nonsensical "Certificate of Compliance" argument, which borders on the bizarre, is untimely and completely meritless. Smith has had more than his share of days in court. Pifer therefore respectfully requests that this Court deny Smith's petition for review.

Respectfully submitted,

DATED: Dec. 1, 1994 POST KIRBY NOONAN & SWEAT

By: _____

Theresa M. Brehl, Esq.
Attorneys for
Respondent/ Appellant
DELBERT W. PIFER

PROOF OF SERVICE BY MAIL
(C.C.P. §1013a(3))

DELBERT W. PIFER v. JAMES E. SMITH
Supreme Court of the State of California No. S043317

I, the undersigned, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California in which county the within-mentioned mailing occurred. My business address is 600 West Broadway, Suite 1100, San Diego, California 92101-3355.

I served the following documents:

ANSWER TO PETITION FOR REVIEW

on the parties in said action by placing a true copy thereof in a separate sealed envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

SEE ATTACHED SERVICE LIST

and I then sealed each envelope and, with the postage thereon fully prepaid, placed it for mailing in accord with our business' practice on December 1, 1994, at San Diego, California.

I am readily familiar with our business practice for

collecting, processing, and mailing correspondence and pleadings with the United States Postal Service. Such correspondence and pleadings are deposited with the United States Postal Service on the same day that it is placed for mailing in the ordinary course of business.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on December 1, 1994, at San Diego, California.

_____

Pamela E. Benson

SERVICE LIST

Mr. James E. Smith
P.O. Box 189003, #106
Coronado, CA 92178-9003
In Propria Persona

Mark A. Potter, Esq.
5090 Shoreham Place, Suite 101
San Diego, CA 92122-5934
For Respondent City

Clerk of the Superior Court
North County Branch
325 So. Melrose Drive
Vista, CA 92083

Court of Appeal
4th Appellate District
750 B Street, Suite 300
San Diego, CA 92101

APPENDIX D

CIVIL NO. SO43317

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PIFER, DEL MAR, et al.,	)	
	)	Appellate No.
Plaintiffs/Cross-Defendants/ Respondents,	)	D017742
	)	
	)	Sup. Ct. No. N51351
v.	)	
	)	
JAMES E. SMITH,	)	
	)	
Defendant/Cross-Complainant/ Appellant.	)	
	)	
	)	
AND RELATED CROSS-ACTIONS.	)	
	)	

REPLY

(On Appeal from the Superior Court of San Diego County, Honorables Ronald L. Johnson and William J. Howatt, Jr.)

James E. Smith
P.O. Box 189003 #106
Coronado, CA 92178-9003
011-526-171-6613 or 6614
In Propria Persona

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
Pifer, et al. v. Smith, No. SO43317

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, State of California, in which county the within mentioned mailing occurred, and not a party to the subject matter. My business address is 110 West C Street #700, San Diego, California 92101. I served the attached REPLY by United States mail addressed as follows:

A. Potter, Esq.
horeham Place, Suite 101
ego, CA 92122-5934
spondent City (1 copy)

. Noonan, Esq.
M. Brehl, Esq.
by Noonan and Sweat
t Broadway, Suite 1100
go, CA 92101-3387
pondent Pifer (1 copy)

Clerk of the Superior Court
North County Branch
325 So. Melrose Drive
Vista, CA 92083
(1 copy)

Court of Appeal
4th Appellate District
750 B Street, Suite 300
San Diego, CA 92101
(1 copy)

The documents were then placed in sealed envelopes, with postage thereon fully prepaid, and either deposited with the United States Postal Service or placed for collection and mailing by me on December 8, 1994, at

BEST AVAILABLE COPY

San Diego, California, following ordinary business practices.

There is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I executed this declaration on December 8, 1994, at San Diego, California.

_____

P. A. Schmidt

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CIVIL NO. SO43317

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

. DEL MAR, et al.,	)	Appellate No. D017742
	)	
ntiffs/Cross-Defendants/Respondents,	)	Sup. Ct. No. N51351
	)	
	)	
	)	
E. SMITH,	)	
	)	
ndant/Cross-Complainant/Appellant.	)	
	)	
ELATED CROSS-ACTIONS.	)	
	)	

REPLY

On Appeal From the Judgment of the Superior Court of the
State of California, San Diego County
Honorables Ronald L. Johnson and William J. Howatt, Jr.

To the Honorable Malcolm Lucas, Chief Justice of California and to the Honorable Associate Justices of the Supreme Court of California:

BEST AVAILABLE COPY

I.

THE PETITION IS TIMELY

It does seem incredible, but Respondent has made what he considers to be a legalistic argument before this Court.

The finger of frivolity is more appropriately pointed at Respondent rather than Appellant. As noted by Respondent, the present petition was filed on November 14, rather than November 12.

Had this Court been open for business on Saturday, November 12, 1994, then the petition would have been filed that day.

Section 12a, Code of Civil Procedure, provides in pertinent part:

> "If the last day for the performance of any act provided or required by law to be performed within a specified period of time shall be a holiday, then such period is hereby extended to and including the next day which is not a holiday. The term 'holiday' as used herein shall mean all day on Saturdays . . . ."

Furthermore, pursuant to Government Code section 6700(a) "Every Sunday" is a holiday, as well as "November 11th, known as Veterans Day." (Govt.C. §6700(k)).

Therefore, November 14 was the next day which was

not a holiday and the filing of the petition on that date was legally correct and timely.

II.

RESPONDENT HAS FAILED TO REFUTE APPELLANT'S POSITION

Respondent's position with regard to the "untimeliness" of the filing of the petition is indicative of not only Respondent's seeming lack of legalese, but also denotative of the level of legalese present in Respondent's opposition arguments throughout the appeal process.

The cavalier approach used by Respondent not only results in faulty legal reasoning but also is a waste of time. Respondent in his opposition has utterly failed to address, by way of legal argument, any of Appellant's positions.

The issue that was remotely addressed legally, e.g., untimeliness of filing, was proven to be without merit although supported by seemingly correct legal authority.

And, so it is with Respondent's remaining positions.

Rather than supplying this Court will well-reasoned legalese in support of his position(s), Respondent has hyperbolically addressed Appellant's "last-ditch effort to invent a bogus basis for review." (Resp. Oppo. Br. p. 5).

Apparently, Respondent believes that the California

Legislature is "patently ridiculous" for its enactment of Government Code section 66499.34, which provides that no local agency shall grant any approval necessary to develop any real property which has been divided in violation of the Subdivision Map Act and local ordinances. Both Respondent and the Court of Appeal are misguided in their position that "final approval" was required to obtain a certificate of compliance.

One merely need do competent research beginning with section 66499.34 of the Government Code and follow the law through to section 66499.35(c) to find that nowhere are the words "final approval" used in connection with the procurement of a certificate of compliance. Rather, the statute expressly refers to the "grant of any approval necessary to develop any real property."

Similarly, in order to determine if there has been an improper division of land constituting a violation of the Subdivision Map Act, one need merely read Map Act section 66424.

The statute is so clear and unambiguous that it is not even susceptible to interpretation, and as this Court has said countless times, "courts should not indulge in it."

Yet, an inordinate amount of legal resources and judicial time has been spent trying to determine whether the latest equalized county assessment roll should be used to determine if a "subdivision" has occurred. This, in spite of the fact that the statute could not be clearer in its direction that the latest equalized county assessment roll must be consulted.

What does the language of Government Code section 66399.32(b) mean? It means simply and straightforwardly that real property, identified in a recorded final map which is the subject of a conveyance, by virtue of its being identified in that map, removes the purchaser of the property from the list of potential plaintiffs provided for in subdivision (a) of that section.

Somehow, into this simple and straightforward procedure the notion that Civil Code sections 831 and 1112 played a role in the interpretation was interjected.

Although sections 831 and 1112 were enacted in 1877 and although the Subdivision Map Act, formerly found in the Govt. Code, has been in existence for approximately one hundred years, the combination of the presumptions in 831 and 1112 with the Subdivision Map Act has never occurred before, until this case. In borrowing from Respondent's brief, Appellant submits that there is something "patently ridiculous" about this case, and it has nothing to do with Appellant's position. To corroborate this contention one only has to examine the legalese offered by Respondent in his opposition to the instant petition.

Appellant expressed a "contrary intent" in his conveyancing documents, just as sections 831 and 1112 call for. Appellant does not have to have governmental authority or approval by way of the Del Mar City Council to do this.

The government cannot and must not be allowed to have the power to tell a citizen property owner that he must sell or transfer his property. If this case is allowed

to stand then the action by the Del Mar City Council amounts to nothing more than a condemnation of Appellant's property without due process and without just compensation being paid.

These are all issues which not only should be of grave concern to the citizens of this state, they must be of grave concern.

From the seminal case of this Court in Earl v. Dutour (1919) 181 Cal. 58 through Bisneatte v. Gourdin (1993) 16 Cal.App.4th 1277, the courts throughout this state have consistently held that, in accordance with sections 831 and 1112, a seller must express a contrary intent in his deed if he is to rebut the presumptions contained in those two sections. Never in this state's legal history has it been held that in so doing, the seller is violating the law. Never has a court of this state held that before a seller can exercise his statutory and common law right to express a "contrary intent" he must have the approval of his local city council. Never, until the instant case and its predecessor case Roulette v. Smith, D017508, has that action been taken by a court of this state.

Certainly it must be acknowledged that given the rulings in these cases, there is complete disharmony between the Appellate divisions of this state which, as shown by these cases, will likely reoccur. There are ample reasons and grounds for this Court to accept this case for review, not the least of which is because a tremendous injustice will result if this court does not review this case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the requested review.

Dated: 12/8/94 Respectfully submitted,

James E. Smith, In Propria Persona

APPENDIX E

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

PIFER, DEL MAR, et al.,	)	Appellate No.
	)	D017742
Plaintiffs/Cross-Defendants/	)	
Respondents,	)	Sup. Ct. No. N51351
	)	
v.	)	
	)	
JAMES E. SMITH,	)	
	)	
Defendant/Cross-Complainant/	)	
Appellant.	)	
	)	
	)	
AND RELATED CROSS-ACTIONS.	)	
	)	

PETITION FOR REHEARING

(Appeal from the Superior Court of San Diego County, Honorables Ronald L. Johnson and William J. Howatt, Jr.)

James E. Smith
2100 Gatun Street
Del Mar, California 92014
(619) 755-7794
In Propria Persona

COURT OF APPEAL, STATE OF CALIFORNIA,
FOURTH DISTRICT, DIVISION ONE
Pifer, et al. v. Smith, Appellate No. D017742; Sup. Ct. No. N51351

PROOF OF SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, State of California, in which county the within mentioned mailing occurred, and not a party to the subject matter. My business address is 110 West C Street #700, San Diego, California 92101. I served the attached PETITION FOR REHEARING by United States mail addressed as follows:

A. Potter, Esq.
horeham Place, Suite 101
ego, CA 92122-5934
spondent City (1 copy)

J. Noonan, Esq.
a M. Brehl, Esq.
rby Noonan and Sweat
treet, Suite 1400
go, CA 92101-8103
spondent Pifer (1 copy)

California Supreme Court
300 South Spring St. 2nd Fl.
Los Angeles, CA 90013
(5 copies)

Clerk of the Superior Court
North County Branch
325 So. Melrose Drive
Vista, CA 92083
(1 copy)

The documents were then placed in sealed envelopes,

BEST AVAILABLE COPY

with postage thereon fully prepaid, and either deposited with the United States Postal Service or placed for collection and mailing by me on October 18, 1994, at San Diego, California, following ordinary business practices.

There is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I executed this declaration on October 18, 1994, at San Diego, California.

_____

Lisa A. Punzo

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I.

INTRODUCTION

Pursuant to California Rules of Court, Rules 27 and 29(b)(2), Appellant James E. Smith hereby petitions this Court for a rehearing of certain portions of the Court's decision entered in this case on October 3, 1994. For convenience, that decision (the "Opinion") is attached hereto as Appendix A. The portions of the Opinion which Appellant seeks rehearing on include the following:

1. The fact that lot U, unlike lots H, I, and J in the prior Roulette action, had received building approval from not only the City of Del Mar but also the California Coastal Commission;

2. Whether the presumptions found in Civil Code sections 831 and 1112 are applicable to subdivision maps;

3. Whether a "portion of lot U was subject to the County's public easement"; and

4. Precisely the division of property which was reflected on the original subdivision map and exactly what was depicted with regard to the dimensions of lot U, and application of the next to the last paragraph of Government Code section 66499.32(b) to the sale of lot U.

The foregoing portions of the Opinion represent issues on material facts which were omitted from or

misstated in the Opinion. These portions of the opinion can impact not only the outcome of this case but are also significant to all property owners and particularly sellers of property adjacent to roadways.

II.

DISCUSSION

A. Lot U Was Given Final Approval For Pifer's Dwelling By Both The City Of Del Mar And The California Coastal Commission.

On February 5, 1991, the California Coastal Commission gave its approval to Mr. Pifer to build on his legal lot U. Prior to that, on November 5, 1990, the City of Del Mar gave its final approval for Mr. Pifer's dwelling on his legal lot U (Exhibit 2 in evidence, R.T. VII 322-29). Within the context of this case, these two facts cannot be treated as if they exist in a vacuum. They do not.

Both governmental bodies, after careful examination and close scrutiny, approved lot U as a suitable lot to build upon. This is precisely what Pifer sought and was in conformity with City of Del Mar Resolution No. 87-71 passed in 1987 stating, inter alia: "The Snakewall property is comprised of 20 lots of record which can be developed in accordance with the Municipal Code."

Mr. Pifer had received the necessary permits and grants required for development of lot U.

California Government Code (Map Act) section 66499.34 provides, in pertinent part:

> "No local agency shall issue any permit or grant any approval necessary to develop any real property which has been divided, or which has resulted from a division, in violation of the provisions of this division or of the provisions of local ordinances. . . .
>
> "The issuance of a permit or grant of approval for development of real property, . . . shall constitute 'real property which has been approved for development,' for the purposes of subdivision (c) of section 66499.35,. . . ."

Subdivision (c) of section 66499.35 provides:

> "A certificate of compliance shall be issued for any real property which has been approved for development pursuant to section 66499.34."

Aside from whether this Court accepts Appellant's reasoning with regard to a recorded final map constituting a certificate of compliance, both sections 66499.34 and 66499.35(c) mandate that the City issue to Pifer a certificate of compliance. This is not discretionary.

> "The statute governing issuance of certificates of compliance, section 66499.35, provides that upon determining compliance with the SMA, the local agency 'shall cause a certificate of compliance to be filed. . . .' The statute confers no discretion upon the local agency to deny a certificate of compliance where compliance is found. As we said in Hunt v. County of Shasta (1990) 225 Cal.App.3d 432, '[i]f the board determines that the property complies, it must issue a certificate of compliance so stating.'"
>
> Findleton v. Board of Supervisors (1993) 12 Cal.App.4th 709, 714.

The City of Del Mar was mandated by law to issue a certificate of compliance for lot U because it had determined that no violation of the Subdivision Map Act had occurred when it approved lot U for Pifer's dwelling.

To then decide at some later date, without holding a hearing, that the very sale formerly sound under the SMA is now improper puts the City of Del Mar in the class of city governments deserving of the various monikers currently bandied about by the citizenry.

Nevertheless, had the City of Del Mar complied with the law, Pifer would not have been able to file his action. In this respect, the Pifer action differs significantly from the Roulette action, although not substantively.

Whether the dwelling approvals in favor of lot U could be considered as a license coupled with an interest in real property and irrevocable is clearly arguable. Whether the City of Del Mar can be punished in any way, for instance, by way of estoppel, to deny that lot U was a legally divided lot, is also highly worthy of argument.

The prevailing view is that whether an estoppel may be invoked against a governmental entity is to be tested by the same rules that apply to individuals.

> "The government will be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against the private party are present and, in the considered view of the court of equity, the injustice that would result from the failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy that would result from the raising of an estoppel."
>
> Lentz v. McMahon (1989) 49 Cal.3d 393, 400.

Applying the same test in the case of City of Long Beach v. Mansell (1970) 3 Cal.3d 462, the California Supreme Court approved the application of estoppel to prevent a local government from asserting paramount title to land pursuant to a claimed constitutional right. Id. at 499-500.

Referring to the series of events including "an

impressive combination of governmental acts encouraging reliance," the Supreme Court stated, quoting from the Court of Appeal:

> "Viewing this combination as a whole, the court concluded: 'We are not prepared to say what portion of this total chain of events, if missing, would vitiate the use of equitable estoppel. What we do hold is that the sum total of all the facts actually here presented convinces us, as it did the trial judge, that this case presents one of those exceptional conditions in which estoppel against a government agency is justified and should be applied.'"
>
> City of Long Beach v. Mansell, supra, 3 Cal.3d at 495-96.

The case at bar likewise presents "one of those exceptional conditions."

This Court can see the manifest injustice which will result here if this case is not viewed and ruled upon for just what it is, a mockery and flaunting by a local government and a willing participant of the laws of this state.

By not ruling that the City of Del Mar was mandated to issue a certificate of compliance following the granting of the permits necessary for development, this Court would be in conflict with the law of other appellate districts in this state as well as in direct contravention of state law. A rehearing should be

granted on this issue.

Appellant has shown that there is "good cause" justifying the Court's consideration of the above issues, and therefore the court should exercise its discretion and consider this issue. (See Mounts v. Uyeda (1991) 227 Cal.App.3d 111, 121.)

B. **Sections 831 And 1112 Of The Civil Code Deal With Property Adjacent To A Street Being Sold Separately From The Street.**

Since the briefs were submitted in this case, the case of Bisneatte v. Gourdin (1993) 16 Cal.App.4th 1277, was published. The case concerns, among other issues, the correct application of the presumptions of Civil Code sections 831 and 1112.

> "Absent evidence of contrary intent, California law sets forth certain presumptions regarding the construction of deeds." [E.g. §§ 831, 1112.]
>
> Bisneatte v. Gourdin, supra, 16 Cal.App.4th at 1281.

This Court has consistently maintained that it is the conduct of the original subdivider and his intent which control the application of the presumptions of sections 831 and 1112 and further that they be applied at the time of the subdivision creation (Opinion, 6). The above-cited case, which is in the Fourth District, is in

direct conflict with this Court's holding, and therefore a rehearing on this point is warranted so as to promote uniformity among the courts of appeal, particularly within the same district.

Although this Court finds its reasoning in the prior cases of Roulette v. Smith and Smith v. Del Mar to be persuasive with regard to the instant case, that reasoning and its affect upon this case, as reflected in the instant Opinion, should be reanalyzed.

While correctly stating the essence of Civil Code sections 831 and 1112, this Court has serendipitously shown how these sections have no meaning when applied to the acts of the original subdivider of the Snakewall property.

Paraphrasing sections 831 and 1112 as well as case law, the Court repeats several times the notion of a person either "owning land adjacent to a road" or "transferring land adjacent to a road" or "buying a lot adjacent to a road." (Opinion, 4.) The operative language of significance here is "land adjacent to a road." In other words, the presumptions of sections 831 and 1112 only operate with respect to "land sold which is adjacent to a street or road." The literature and case law confirm this.

> "The presumptions only arise when there is a conveyance of land and within that conveyance the street or alley is designated as a monument or boundary."

Augustine and Zarrow, Calif. Real Estate Law and Practice, (1991) Vol. 3, § 81.13; Millyard v. Faus (1968) 268 Cal.App.2d 76, 83. (Emphasis added.)

The Court will remember that the Snakewall property (20 lots) was created and that those lots came into being back in 1911-1913 (Exhibit 1 in evidence). Lot U was one of those lots. At the time the property was subdivided, it was owned in its entirety in fee by one individual. At that same time, the County of San Diego acquired easements over the various streets and alleys which were vacated and abandoned by the County in 1925. The property was sold in its entirety in 1972 and again in its entirety to Appellant in 1977. In 1989, Lot U was sold to Respondent Pifer. Lot U is bordered by a vacated Gatun (Oribia) Street and public Zappo Street.

It was at this sale to Pifer whereby this Court's language regarding "transfers of land adjacent to a road" is most significant. Prior to the sale to Pifer, lot U was never transferred as "land adjacent to a road" nor "was it conveyed whereby the street [Oribia] was designated as a monument or boundary." Millyard v. Faus, supra, at 83. As such, the presumptions contained in sections 831 and 1112 would arise only, as this Court has pointed out, when lot U was transferred as "land adjacent to a road."

Therefore, this Court clearly misspoke when it presumed, pursuant to Civil Code sections 831 and 1112, that the lots, when they came into being, extended

to the centerline of the adjacent streets and alleys "since no contrary intent by the original subdivider was established." (Opinion, 6.) The presumptions could only apply, if at all, to the Pifer transfer.

C. **A Portion Of Lot U Was Never Subject To The County's Easement.**

The Court contends:

> "When the county vacated and abandoned the Snakewall streets and alleys in 1925, that portion of lot U which was subject to the county's public easement (i.e., one-half of the adjacent street) reverted to lot U. (See, e.g., Pilkington v. Fausone, supra, 11 Cal.App.3d 349, 351-52.)"

(Opinion, 6.)

This contention presupposes and is premised upon the notion that, contrary to the configuration in Final Map #1343 (Exhibit 1 in evidence), lot U extended to the centerline of the adjacent street at the time of the original subdivision. As shown in the previous argument, this contention must fail.

Furthermore, the language used by the Court misstates the effect of a vacation or abandonment of a street or alley. Stating that, "upon abandonment, that portion of lot U which was subject to the county's public easement (i.e., one-half of the adjacent street) reverted to lot U," clearly connotes the following deduction. Stated another way, the contention is "that portion of

lot U . . . reverted to lot U."

Therefore, prior to "reverting," "that portion of lot U" must have been separated from "lot U." This is elementary.

> "Revert -- To turn back, to return to. With respect to property to go back to and lodge in former owner, who parted with it by creating estate in another which has expired."
>
> Black's Law Dictionary, 6th Ed. (1990).

Yet, we know that when the property was originally subdivided and the streets and alleys were formed along with the lots, the County was given only an easement over the land designated as streets and alleys, specifically Oribia Street which bounds lot U (see Final Map #1343, Exhibit 1, which reflects the easement dedication).

Upon abandonment or vacation of the streets and alleys, "the government authority merely surrenders the rights which have been acquired by the public." Severo v. Pacheco (1946) 75 Cal.App.2d 30, 33.

> "The vacation or abandonment of a public street or highway terminates the public easement and the rights of the general public to use the right-of-way and the surface rights of use revert to the owner of the underlying fee."

Miller and Starr, Calif. Real Estate Law 2d, Easements, (1990) Vol. 5, § 15:80, 604-05, fn. 1 (wherein numerous authorities are cited for the above proposition).

Additionally, section 8351 of the California Streets and Highways Code addresses specifically the effect of an abandonment of a public easement by the city/county and provides that title to the property is thereafter free from the easement.

If, as this Court suggests, a portion of lot U reverted to lot U, then title to the property had to have been given to the County when the property was subdivided. We know this was not done. In conformity with California law, supra, it is only the surface rights of use, not a portion of lot U, which revert. Furthermore, the surface rights do not revert back to the adjacent lot either, instead, they revert to the owner of the fee which underlies the street.

A "street" (or "alley") is merely a strip of land designated a "street" and in its usual and ordinary meaning denotes a public highway." Loma Vista Inc. v. Roman Cath. Archbishop (1958) 158 Cal.App.2d 58, 63. Essentially, a street is a right-of-way over a strip of land. If the street is dedicated, the right-of-way is in favor of the public; if the street is abandoned, then the right-of-way (e.g., easement) goes back to the person who owns the fee in the strip of land.

When the Snakewall property was originally subdivided and strips of land were laid out for streets,

the lots on each side of those streets did not, as the Court suggests, bound one another. Rather, the lots bounded and were bounded by the streets.

> "The Machado decree laid out the strip of land in suit as a 'street' -- 'Flower and Hill Streets each 50 links wide [metes and bounds description].'"
>
> Loma Vista Inc. v. Roman Cath. Archbishop, supra, at 63.

Therefore, the Court's portion of the Opinion stating that a portion of lot U reverts to lot U upon abandonment is both factually and legally incorrect. Also, implying that the street (Oribia) which bounds lot U is over lot U, or rather a portion of it, is factually and legally incorrect. Correction of this misstatement will change the outcome of this case, thereby mandating that a rehearing be had.

D. The Next To The Last Paragraph Of Government Code Section 66499.32, Subdivision (b), Cannot Be Inapplicable.

Regardless of the Court's feeling with regard to whether Appellant sold Pifer all of lot U or only a portion of lot U, this has no bearing upon the mandate of the exemption found in section 66499.32(b), next to the last paragraph, which provides, in pertinent part:

> "The provisions of this section shall not apply to the conveyance of any parcel of real property . . . identified in a recorded final

map, from and after the date of recording."

The clear import of the language of the statute has nothing to do with whether the alley was excluded from the conveyance. The parcel of real property which was conveyed to Pifer was "identified in a recorded final map."

The lot U depicted on the final map reflects and depicts lot U as bounded by Oribia Street. These boundary lines are clear and unassailable. (See Exhibit 1 in evidence, Final Map #1343.) The boundary lines of lot U as depicted on Final Map #1343 do not extend to the centerline of Oribia Street. In fact, the following excerpts from the Opinion clearly reflect the Court's awareness that the boundary lines on the final map do not depict lot U as encompassing any of the adjacent street.

> "In 1989, Smith sold lot U by reference to the 1911 subdivision map to Pifer but excluded the adjacent street."
>
> (Opinion, 3.)
>
> ". . . California law presumes a person owning land adjacent to a road owns the land to the center. . . ."
>
> (Opinion, 4.)
>
> ". . . we must presume the lots of the original Snakewall subdivision extended to the center-line of adjacent streets or alleys. . . ."

(Opinion, 6.)

". . . the street unit which he retained and the non-street unit which he sold. . . ."

(Opinion, 6.)

The Court has more than passing awareness that the street adjacent to lot U is not depicted on the final map as being part of lot U, otherwise why would the Court keep referring to it as being adjacent to lot U? Additionally, the Court concedes that it is only presuming the lots, and consequently the lot lines, extend to the centerline of the adjacent street.

Therefore, we know that Smith sold lot U and excluded the adjacent street. Consequently, and logically, Smith sold the lot U which this Court recognizes as being adjacent to the street. This Court recognizes that lot U is adjacent to the street because, presumably, the Court has examined the final map and seen that lot U is adjacent to the street, or the Court has accepted as true the trial court's statement for the record that "the final map does not show the lot lines as extending to the centerline of the adjacent street." (See R.T. IX 409:27-28, 410:1-11.)

There is but one conclusion -- Smith sold lot U as it was depicted on the final map. To say otherwise is not only anomalous but forces upon Appellant an interpretation of section 66499.32(b), next to the last paragraph, which at best is interstitial. Appellant is clearly left in the middle between describing his property pursuant to a final map, risking rescission, and

being forced to sell property he does not have to sell, i.e., his streets and alleys.

The Court's holding that "Smith did not sell the same lot as depicted on the subdivision map" (Opinion, 9-10) is diametrically opposed to its findings in the Opinion on pages 3, 4, and 6. Smith did sell lot U as it was identified on Final Map #1343, and therefore the exemption of section 66499.32(b), next to the last paragraph, must apply.

Regarding the Court's "presumption" that the lot lines extend to the centerline of the adjacent street (Opinion, 6) and the effect this presumption has upon the actual boundaries depicted on the final map, California law is as follows:

> "This argument points up the significance of the rule limiting the application of section 1112 to a deed describing property as bounded by a street as such. That section does not contemplate the substitution of an assumed boundary for one actually described."
>
> Speer v. Blasker (1961)
> 195 Cal.App.2d 155, 161. (Emphasis added.)

This Court is clearly substituting its own idea of the assumed boundary location (pursuant to sections 831 and 1112) for the one actually depicted and described on the final map. This is improper.

E. The Court Failed To Address Government Code Section 66424, Which Defines "Subdivision."

In examining how Appellant Smith improperly subdivided lot U upon its conveyance to Pifer, the Court failed to address the most elementary aspect of any examination of this type, that is, what a "subdivision" is. In order to have an illegal subdivision, one must begin with a subdivision. The Map Act defines "subdivision" at section 66424 as the division of any improved or unimproved land shown on the latest equalized county assessment roll as a unit.

The trial court surmised that the county assessment roll was "merely for the purpose of providing a convenient method of identifying the property. . . ." (See Order of the Court after Hearing on Motion for Summary Judgment . . . DOI 7742, C.T. II 378:10-18.)

For sake of argument and for the moment acceding to that purported purpose, identifying the particular property to be subdivided is the first and perhaps most critical step in the analysis.

Lot U, as it is depicted on Final Map #1343, is the very same lot U which is reflected as a unit on the latest county assessment roll (Exhibits 1 and 4 in evidence).

Aside from whether one applies the presumptions of sections 831 and 1112 to the act of originally subdividing the Snakewall property, lot U as identified on San Diego County's latest equalized county assessment roll is the same lot U as depicted on Final Map #1343.

As shown previously, lot U as depicted on Final Map #1343, and not the lot U "presumed" to extend to the centerline of the adjacent street, was not divided. Certainly, this fact cannot be in dispute. Therefore, if the lot U depicted on the final map, undivided, is the same lot U identified on the latest equalized county assessment roll, then it too must be undivided.

As we have shown via this Court's own findings, Appellant Smith conveyed lot U which was adjacent to the street. If that lot U is the same lot U identified in the assessment roll, and it is undivided, as the Court has found, then as a matter of law there can be no subdivision and hence no illegal subdivision. This is irrefutable.

III.

CONCLUSION

The points and issues raised in the preceding petition are addressed by Appellant because this Court has either failed to address them or has misstated the law and the facts with regard to the issues. Particularly with regard to the direct conflict between this Court's Opinion and that of another court in this district, this Court should reconsider and rehear the issues presented. These issues affect a significant number of property owners in California and should be reheard so

as not to create an unsettled area of property law dealing with the presumptions of sections 831 and 1112.

Dated: October 18, 1994 Respectfully submitted,

James E. Smith
In Propria Persona

APPENDIX F

**SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH**

MARGARET L. ROULETTE, S. SCOTT EMSLEY and ROBIN S. EMSLEY,	Case No. N 49451 [consolidated with N 51351)
Plaintiffs,	**ORDER AFTER HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES [N 51351]**
v.	
JAMES E. SMITH; and DOES 1 through 15, inclusive,	
Defendants.	

The motion of Defendant James E. Smith for summary judgment or summary adjudication of issues as to the complaint filed by Plaintiff Delbert Pifer in San Diego Superior Court case number N 51351 came on regularly for hearing on April 3, 1992 in Department D of the above-entitled Court, the william J. Howatt, Jr., Judge Presiding.

Defendant James E. Smith appeared in propria persona. Plaintiff appeared by counsel James B. Mehalick.

Having carefully considered all oral and written

arguments presented and having taken the matter under submission, the Court rules as follows:

Defendant's motion is denied. The Court finds as a matter of law that Deft subdivided lot U by retaining a portion of the adjoining alley in violation of the Subdivision Map Act.

Pursuant to Government Code § 66424, a subdivision is defined as follows:

> "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease, or financing, whether immediate or future except for leases of agricultural land for agricultural purposes."

If land is divided, compliance must be had with the Subdivision Map Act.

The Court is unpersuaded by Defendant's argument that there was no violation of the Subdivision Map Act because Defendant conveyed only that real property depicted in the latest equalized county assessment roll and the adjoining alley was not included within that depiction. The reference to the "assessment roll" in § 66424 is merely for the purpose of providing a convenient method of identifying the property and has no effect on the application of the Subdivision Map Act, [See 62 Ops. Cal. Atty. Gen. 147], nor upon what is meant or intended to be a "division" under the Act.

After the vacation of the streets and alleys in 1925, there was a presumption pursuant to Civil Code §§ 831 and 1112 that the owner of lot U owned to the center of the adjoining alley and accordingly, had the right to possess and occupy that portion of the alley. While Defendant claims that a contrary intent could be shown to rebut the presumption and was in fact shown by his elimination of the alley from the conveyance to Plaintiff, this does not excuse Defendant from complying with the Subdivision Map Act.

IT IS SO ORDERED.

Dated: Apr. 15, 1992 William J. Howatt, Jr.

/s/ William J. Howatt
Judge of the Superior Court

APPENDIX G

**SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH**

MARGARET L. ROULETTE, S. SCOTT EMSLEY and ROBIN S. EMSLEY, Plaintiffs, v. JAMES E. SMITH; and DOES 1 through 15, inclusive, Defendants.	Case No. N 49451 [consolidated with N 51351) **ORDER AFTER HEARING ON MOTION FOR SUMMARY ADJUDICATION OF ISSUES [N 51351]**

The motion of Plaintiff Delbert Pifer for summary adjudication of issues as to the complaint filed by Plaintiff in San Diego Superior Court case number N 51351 came on regularly for hearing on April 3, 1992 in Department D of the above-entitled Court, the William J. Howatt, Jr., Judge Presiding.

Plaintiff appeared by counsel James B. Mehalick. Defendant James E. Smith appeared in propria persona. Cross-defendants City of Del Mar and Del Mar City Council appeared by counsel Mark A. Potter.

Having carefully considered all oral and written

arguments presented and having taken the matter under submission, the Court rules as follows:

To the extent that Defendant has incorporated by reference his separate statement and request for judicial notice, the Court's prior ruling as to those documents is to be applied here as follows:

The Court declines to take judicial notice of the following items as inappropriate: a-l, a-4, a-9, a-I0, a-13, b-l, c-l, c-2, c-4, c-5, c-6, d-l, d-2, d-3, d-5, d-6, d-7, d-8, d-1l, d-12, d-13, d-14, d-17, d-19, d-21, d-23, d-24, d-25, e-l, f-l & f-2.

The Court strikes the following "disputed facts" from Defendant's separate statement as irrelevant: 6-7, 16-17, 19-21, 23-28, 30, 32-34, 36-48, 50 and 52-74.

The Court also strike facts 9 and 49 from Defendant's separate statement as irrelevant.

Plaintiff's motion for summary adjudication of issues is granted except as to issue 15. Issue 15 was not addressed in either Plaintiff's separate statement or Plaintiff's moving points and authorities.

The Court finds as a matter of law that Deft subdivided lot U by retaining a portion of the adjoining alley in violation of the Subdivision Map Act.

Pursuant to Government Code § 66424, a subdivision is defined as follows:

"the division, by any subdivider, of any unit or

units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease, or financing, whether immediate or future except for leases of agricultural land for agricultural purposes."

If land is divided, compliance must be had with the Subdivision Map Act.

The Court is unpersuaded by Defendant's argument that there was no violation of the Subdivision Map Act because Defendant conveyed only that real property depicted in the latest equalized county assessment roll and the adjoining alley was not included within that depiction. The reference to the "assessment roll" in § 66424 is merely for the purpose of providing a convenient method of identifying the property and has no effect on the application of the Subdivision Map Act, [See 62 Ops. Cal. Atty. Gen. 147], nor upon what is meant or intended to be a "division" under the Act.

After the vacation of the streets and alleys in 1925, there was a presumption pursuant to Civil Code §§ 831 and 1112 that the owner of lot U owned to the center of the adjoining alley and accordingly, had the right to possess and occupy that portion of the alley. While Defendant claims that a contrary intent could be shown to rebut the presumption and was in fact shown by his elimination of the alley from the conveyance to Plaintiff, this does not excuse Defendant from complying with the Subdivision Map Act.

In light of the Court's finding, it follows that no

cause of action can be stated against Cross-defendants City of Del Mar and Del Mar City Council for recording the notice of violation against lot U. Pursuant to Government Code § 66499.36, whenever it is determined that real property has been divided in violation of the Subdivision Map Act, a notice of violation must be recorded with the county recorder. Accordingly, the Court grants judgment on the pleadings without leave to amend as to Defendant's cross-complaint in favor of Cross-defendants City of Del Mar and Del Mar City Council.

Although the joinder of Cross-defendants City of Del Mar and Del Mar City Council in the instant motion for summary adjudication was untimely filed and served pursuant to San Diego Superior Court Rules, Division II, § 4.1(1) and the additional request for summary judgment on the cross-complaint raised in Cross-defendants' joinder was untimely noticed, the Court finds that Defendant was not prejudiced since the fully briefed arguments and evidence raised by the parties as to plaintiff Pifer equally pertain to Cross-defendants City of Del Mar and Del Mar City Council.

No cause of action can be stated against Cross-defendant Pifer on the remaining causes of action 1 and 8 for equitable indemnity and declaratory relief to the extent that these causes of action are premised upon the allegation that Plaintiff improperly caused a notice of violation to be recorded against lot U.

This ruling is dispositive of the first and second causes of action of the complaint and those causes of

action of the cross-complaint filed by Defendant and against Cross-defendants City of Del Mar and Del Mar City Council. The remaining third, fourth and fifth causes of action of the complaint, the damages sought pursuant to the second cause of action of the complaint, and the first and eighth causes of action of the cross-complaint as to Cross-defendant Pifer shall be determined at the trial of this matter.

IT IS SO ORDERED.

Dated: Apr. 15, 1992

William J. Howatt, Jr.
Judge of the Superior Court

APPENDIX H

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY JUDICIAL DISTRICT**

DELBERT W. PIFER, AN INDIVIDUAL, Plaintiff, v. JAMES E. SMITH, AN INDIVIDUAL, AND DOES 1 THROUGH 20, INCLUSIVE, Defendants.	CASE NO. N 51351 ANSWER TO COMPLAINT

Defendant James E. Smith ("Smith") answers the complaint on file herein as follows:

1. For an answer to paragraph 1, Smith lacks sufficient information or belief as to where plaintiff has or is residing to admit; and therefore denies all allegations contained in paragraph 1.

2. For an answer to paragraph 2, Smith admits these allegations.

3 and 4. For an answer to paragraph 3 and 4, Smith denies all allegations contained therein as he lacks sufficient information to respond to the allegations contained therein.

5. For an answer to paragraph 5, 1st sentence, Smith admits that said Map 1343 was recorded on 6-8-11 as reflected by Smith's Lodged Exhibit "C" which does reflect thereon said Lot U; 2nd sentence, Smith admits written escrow instructions were executed and per Smith Lodged Exhibit "X" said instructions are thereon identified as the "Sale Escrow Instructions"; 3rd sentence, Smith admits the escrow closed on 10-13-89. Smith denies all else contained in paragraph 5 as he lacks sufficient information to respond to the allegations contained therein.

6. For an answer to paragraph 6, Smith admits all allegations contained therein, except that the Agreement is "Sale Escrow Instructions" per Smith Lodged Exhibit "X".

7. For an answer to paragraph 7, Smith denies that the down payment was $50,000.00. Pifer offset $8,000.00 or 2% of the 6% sales commission from the gross sales price of $408,000.00 for a net sales price of $400,000.00. Pifer is a licensed real estate broker and a general contractor. See "Supplemental Escrow Instructions pertaining to commission" with Smith Lodged Exhibit "X".

A copy of the note and recorded deed of trust for Pifer lot U is with Smith Lodged Exhibit "X".

Accordingly, for an answer to paragraph 7, Smith denies all allegations contained therein.

8. For an answer to paragraph 8, Smith denies all allegations contained therein except the "legal lot" definition stated in sentence #2. Both Pifer and Smith relief upon Smith Lodged Exhibit "C", the 6-8-11 recorded Subdivision Map and Del Mar 7-15-86 Certificate of Compliance letter with Smith Lodged Exhibit "R".

9. For an answer to paragraph 9, Smith denies all allegations contained therein. With Smith Lodged Exhibit "LL" is Book 1097, page 489, of the public recorded record which reflects Oribia Street, adjoining Lot U on its east line, was vacated on 7-20-25. Lot U, on its west line, fronts on public Zapo Street.

10. For an answer to paragraph 10, Smith denies all allegations contained therein with the exception of the last sentence which Smith admits.

11. For an answer to paragraph 11, Smith denies all allegations contained therein as Smith Lodged Exhibits "DD" and "000" reflect Del Mar and Coastal Commission approval for the Pifer on Lot U.

12. For an answer to paragraph 12, Smith denies all allegations contained therein as Smith Lodged Exhibit "AAA" dated 12-6-90 was Smith's first knowledge of "Violation Intention" of Del Mar.

13. For an answer to paragraph 13, Smith denies all allegations contained therein. In addition,

Smith Lodged Exhibit "XX", which is Exhibit "QQQ" to NCSC No. N 49451, Smith Petition for Writ of Mandate, fully illustrates Smith challenge of Del Mar illegal conclusion and the legal principles upon which Smith relies.

14. For an answer to paragraph 14, Smith admits the allegations contained herein. In addition, Smith Lodged Exhibit "YY" confirms Del Mar followed Pifer instructions to record the "Notice of Violation" and illustrates Pifer and Del Mar's ongoing dialogue regarding the recordation on 1-14-91.

15. For an answer to paragraph 15, Smith denies all allegations contained therein. In addition, Smith Lodged Exhibits "DD" and "000" reflect Del Mar and Coastal Commission approval of the Pifer house on Lot U.

16. For an answer to paragraph 16, Smith, by reference, restates here, paragraphs 1 through 15 above.

17. For an answer to paragraph 17, Smith denies all allegations contained therein.

18. For an answer to paragraph 18, Smith denies all allegations contained therein. Smith Lodged Exhibit "G", Attachment 3, at page 101 and 102, sets forth Map Act Section 66499.32 (a) and (b). The next to the last paragraph of §66499.32 (b) states: "THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO THE CONVEYANCE OF ANY PARCEL OF REAL PROPERTY IDENTIFIED IN A RECORDED FINAL MAP FROM AND AFTER

THE DATE OF RECORDING." See Smith Lodged Exhibit "C" for the 6-8-11 recorded final map. JUDICIAL NOTICE PLEASE: BASED ON §66499.32 (b), NEXT TO THE LAST PARAGRAPH, AS STATED ABOVE, PLAINTIFF HAS NO STANDING WHATSOEVER BY LAW, FOR THIS COMPLAINT.

19. For an answer to paragraph 19, Smith, by reference, restates here, paragraphs 1 through 18 above.

20. For an answer to paragraph 20, Smith denies all allegations contained therein.

21. For an answer to paragraph 21, Smith admits Map Act §66499.32 (b) as stated in #18 above, incorporated here by reference, is effective. As such, Smith denies the allegations contained in paragraph 21.

22. For an answer to paragraph 22, Smith, by reference, restates here paragraphs 1 through 21 above.

23. through 32. For an answer to paragraphs 23 through 32 inclusive, Smith denies all allegations contained therein.

33. For an answer to paragraph 33, Smith, by reference, restates here paragraphs 1 through 32 above.

34. For an answer to paragraph 34, Smith admits this allegation, except the Agreement is headed "Sale Escrow" per Smith Lodged Exhibit "X".

35. through 37. For an answer to paragraphs 35

through 37, denies all allegations contained therein.

38. For an answer to paragraph 38, Smith, by reference, restates here paragraphs 1 through 37 above.

39. For an answer to paragraph 39, Smith admits these allegations.

40. through 42. For an answer to paragraphs 40 through 42, Smith denies all allegations contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The complaint, and each alleged cause of action contained therein, fails to state sufficient facts to constitute a cause of against this answering defendant.

SECOND AFFIRMATIVE DEFENSE

Plaintiff has failed to take adequate steps to mitigate, reduce, or otherwise diminish his damages, if any, with respect to the matters alleged in the complaint, and by reason of failure, plaintiff is barred from recovery herein.

THIRD AFFIRMATIVE DEFENSE

With regard to the matters and allegations alleged in the complaint, plaintiff's conduct with regard to the matters alleged in the complaint estops plaintiff from any recovery in this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff is barred from seeking relief against this answering defendant under the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff is barred from seeking relief against this answering defendant under the doctrine of waiver.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, as alleged in the complaint were by his own actions, the actions of third parties, including City of Del Mar, agents of plaintiff, agents, employees, and individuals representing the City of Del Mar, and other individuals to this answering defendant.

SEVENTH AFFIRMATIVE DEFENSE

This answering defendant is informed and believes and thereon alleges that plaintiff's complaint, and each cause of action contained therein, is barred under the applicable statute of limitations.

EIGHTH AFFIRMATIVE DEFENSE

Map Act Section 66499.32 (b), next to the last paragraph, as stated in #18 above, precludes any standing whatsoever for this complaint.

NINTH AFFIRMATIVE DEFENSE

Plaintiff has failed to set forth material, necessary

and essential allegations in plaintiff's fraud cause of action.

TENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from any relief in this action including recovery of damages and any rescission of the subject transactions under the doctrine of unclean hands.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from any rescission of the subject transactions, or any other relief in this action, based on his default prior to the recordation of the notices of violation.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff is barred from any relief in this action based on his failure to accept the conveyance by Smith of portions of the vacated alleys, which the City of Del Mar acknowledges would have allowed plaintiff to develop said lots.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from any recovery based on the notice of violation for the subject lot based upon plaintiff's active encouragement and participation in the recordation of said notices by the City of Del Mar.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from any recovery based on the notice of violation based on the fact that said notices were illegally recorded in violation of the pertinent Government Code sections.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from any recovery of punitive damages from this answering defendant as any imposition of punitive damages violate this answering defendant's pertinent Constitutional rights and safeguards.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from any recovery under, relief or rescission of the subject agreements under the doctrine of equal fault.

WHEREFORE, Smith prays for judgment as follows against plaintiff:

1. That plaintiff take nothing by virtue of his complaint;

2. That no decree of lien issue as requested in plaintiff's prayer;

3. For Smith Propria Personal normal hourly billing reimbursement and attorney's fees pursuant to Exhibit "C" to plaintiff's complaint;

4. For costs of suit; and

5. For such other and further relief as the court deems just and proper.

6. A court order that plaintiff timely respond, as provided by law, to defendant Cross-Complaint being filed concurrently with this answer.

Dated: _____

_____
JAMES E. SMITH
Propria Persona

VERIFICATION

I, James E. Smith, am the defendant in the above-entitled proceeding. I have read the foregoing Answer to Complaint, and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was executed at Del Mar, California on May 24, 1991.

_____

JAMES E. SMITH

APPENDIX I

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH

DELBERT W. PIFER, AN INDIVIDUAL, Plaintiff, v. JAMES E. SMITH, AN INDIVIDUAL, AND DOES 1 THROUGH 20, INCLUSIVE, Defendants.	) CASE NO. N 51351)) COMPLAINT FOR:) (1) RESCISSION) FOR VIOLATION) OF GOVERNMENT) CODE;) (2) DAMAGES FOR) VIOLATION OF) GOVERNMENT) CODE;) (3) FRAUD;) (4) BREACH OF CONTRACT; AND (5) BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

COMES NOW the plaintiff, DELBERT W. PIFER, and for causes of action alleges as follows:

GENERAL ALLEGATIONS

1. At all times mentioned herein plaintiff was and is a resident of the County of San Diego, State of

California.

2. At all times mentioned herein defendant JAMES E. SMITH (hereinafter "SMITH") was and is a resident of the County of San Diego, State of California.

3. Plaintiff is ignorant of the true names or capacities of defendants sued herein as DOES 1 through 20, inclusive, and therefore sues these defendants by such fictitious names.

Plaintiff will amend this complaint to allege their true names and capacities when they have been ascertained.

4. Plaintiff is informed and believes and thereon alleges that at all times mentioned herein each of the defendants was the agent, employee and/or servant of each of the remaining

defendants and, in doing the things mentioned herein, were acting within the cause and scope of such agency and employment and with the permission and consent of each of the remaining defendants.

5. On or about October 13, 1989, plaintiff purchased from defendant SMITH an undeveloped lot identified as Lot "U" in Block 12 of Arden Heights Unit No. 4, according to Subdivision Map No. 1343 filed in the Office of the County Recorder of San Diego County. In connection with defendant SMITH's sale of said lot to the plaintiff, the parties agreed to written escrow instructions on October 13, 1989 (hereinafter referred to as "The Agreement"), a copy of which is attached hereto as Exhibit "A" and incorporated herein by this

reference. Escrow for the purchase of Lot "U" closed on October 13, 1989.

6. Pursuant to The Agreement, defendant SMITH executed and delivered to plaintiff a Grant Deed to Lot "U," a copy of which is marked as Exhibit "B" and incorporated herein by this reference.

7. Pursuant to The Agreement, plaintiff made a cash down payment in the sum of $50,000.00, and executed a Promissory Note in the sum $350,000.00 payable to defendant SMITH and secured by a Deed of Trust on Lot "U." A copy of the Promissory Note is attached hereto as Exhibit "C" and incorporated herein by this reference; a copy of the Deed of Trust is attached hereto as Exhibit "D" and incorporated herein by this reference.

8. Prior to the sale of Lot "U", defendant SMITH told and represented to plaintiff that the parcel was a separate legal lot. The term "legal lot" means that a parcel of land has been created in a manner consistent with the California Subdivision Map Act, Cal.Gov't. Code §66410 et seq. ("Subdivision Map Act") and, therefore, may be sold and developed. Plaintiff relied on this representation in deciding to purchase the parcel. At the time defendant SMITH made these representations, he either knew that the parcel was not a separate legal lot within the meaning of the Subdivision Map Act or asserted that the parcel was a legal lot even though he possessed no knowledge which would warrant such an assertion. Defendant SMITH made the statements with the intent to induce plaintiff to purchase the parcel.

9. Plaintiff is informed and believes and thereon alleges that in approximately 1924 the County Board of Supervisors, for the County of San Diego, closed a portion of a street named Gatun, a portion of which was located adjacent to the subject parcel.

10. Pursuant to The Agreement, defendant SMITH did not convey to plaintiff any portion of the subject parcel which constituted the adjoining vacated street. According to California law, the parcel includes the portion of the vacated street which The Agreement and the Grant Deed exclude. Plaintiff did not know or have reason to know that a discrepancy existed between the property which defendant SMITH conveyed to plaintiff and the proper description of the parcel contained in the deed. Furthermore, plaintiff did not know or have reason to know that the parcel was not a legal lot within the Subdivision Map Act at the time he purchased the parcel.

11. After purchasing the parcel, and while relying on defendant SMITH's representation that the parcel was a legal lot, plaintiff undertook an effort to obtain permits and approvals from the City of Del Mar to improve the parcel. Plaintiff expended significant amounts of time and money in his undertaking to obtain such permits and approvals from the City of Del Mar.

12. On or about November 27, 1990, the City of Del Mar informed plaintiff that because defendant SMITH failed to convey that portion of the vacated street which was adjacent to the subject parcel, said parcel was not in compliance with the Subdivision Map Act, and, as conveyed to plaintiff by defendant SMITH, was not a

legal lot.

13. On or about December 6, 1990, the City of Del Mar delivered to the plaintiff a notice of Intention to Record a Notice of Violation which confirmed that the parcel was an illegal lot within the meaning of the Subdivision Map Act. A copy of said notice is attached hereto as Exhibit "E" and incorporated herein by this reference.

14. On January 14, 1991, the City of Del Mar recorded the Notice of Violation/Illegal Subdivision, a copy of which is attached hereto as Exhibit "F" and incorporated herein by this reference.

15. As a result of the foregoing, plaintiff has suffered great and inordinate harm. Plaintiff cannot develop the parcel because the City will not permit development of an illegal lot. Furthermore, plaintiff would commit a misdemeanor if he sold or leased any portion of the illegal parcel. Plaintiff has incurred substantial expenses while trying to improve the parcel and while trying to obtain permits and approvals for the improvements. In summary, the parcel sold by defendant SMITH to plaintiff was made useless by defendant SMITH's violation of the Subdivision Map Act.

FIRST CAUSE OF ACTION

(Rescission for Violation of Government Code)

16. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1

through 15 as though fully set forth herein.

17. The parcel plaintiff purchased from defendant SMITH is an illegal lot within the meaning of the Subdivision Map Act.

18. Pursuant to Cal. Gov't. Code §66499 (a) plaintiff intends the service of the summons and complaint in this action to serve as notice of plaintiff's election to rescind the sale of the parcel and The Agreement.

SECOND CAUSE OF ACTION

(Damages for Violation of Government Code)

19. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 18 as though fully set forth herein.

20. As a direct and proximate result of defendant SMITH's sale of the parcel in violation of the Subdivision Map Act, plaintiff has suffered damages in an amount to be proved at trial.

21. Plaintiff seeks recovery of these damages pursuant to Cal. Govt. Code §66499.32(b).

THIRD CAUSE OF ACTION

(Fraud: Intentional Misrepresentation and Negligent Misrepresentation)

22. Plaintiff realleges and incorporates by reference

each and every allegation contained in paragraphs 1 through 21 as though fully set forth herein.

23. Defendant SMITH, knowing the representations to be false, and with the intent to deceive the plaintiff and induce plaintiff into purchasing the parcel, falsely and fraudulently represented to plaintiff that the parcel was a legal lot.

24. Even if defendant SMITH did not know that the parcel was an illegal lot, defendant SMITH's claim that the parcel was a legal lot was not warranted by information possessed by defendant.

25. The representations made by defendant SMITH were in fact false because the property which defendant sold to plaintiff was divided in violation of Subdivision Map Act.

26. By reason of defendant SMITH's misrepresentation that the parcels conformed to the Subdivision Map Act and his failure to disclose that the parcels violated the Subdivision Map Act, defendant has committed fraud.

27. Plaintiff did not ultimately know the parcel was an illegal lot until January 14, 1991, when the City of Del Mar recorded the Notice of Violation on the parcel.

28. Plaintiff reasonably and justifiably relied upon the representations of defendant SMITH by virtue of his superior knowledge concerning the legal status of the parcels.

29. Plaintiff will suffer substantial harm and injury unless the sale of the parcel and The Agreement are rescinded, and the accompanying Promissory Note and Deed of Trust voided, in that plaintiff would be deprived of his bargain because unlike the property he intended to purchase, the parcel cannot be developed or legally sold.

30. As a proximate result of defendant SMITH's fraud and deceit, and the facts herein alleged, plaintiff purchased property which cannot be developed or sold, and expended considerable funds in an attempt to make the property useful, resulting in damages in an amount to be proved at trial.

31. Plaintiff intends service of the summons and complaint in this action to serve as notice of plaintiff's election to rescind the sale of the parcel and The Agreement. Plaintiff hereby demands that defendant SMITH restore the plaintiff's consideration furnished by him, specifically the sum of $400,000.00 plus the costs incurred by plaintiff in trying to develop the parcel and efforts to bring the parcel into conformance with the Subdivision Map Act, in an amount to be proved at trial.

32. Such acts and omissions by defendant SMITH were done willfully, wantonly and with conscious disregard of plaintiff's rights, and were done with the knowledge that such acts and omissions would substantially injure plaintiff, entitling plaintiff to punitive and exemplary damages in an amount to be proved at the time of trial.

FOURTH CAUSE OF ACTION

(Breach of Contract)

33. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 32 as though fully set forth herein.

34. Defendant SMITH agreed in The Agreement to transfer a legal lot to the plaintiff.

35. Plaintiff fully performed all covenants, obligations, and promises he agreed to perform pursuant to The Agreement.

36. Defendant SMITH breached The Agreement in that said defendant did not transfer a legal lot to the plaintiff.

37. As a result of defendant SMITH's breach of The Agreement, plaintiff has sustained damages in an amount to be proved at trial.

FIFTH CAUSE OF ACTION

(Breach of Covenant of Good Faith and Fair Dealing)

38. Plaintiff realleges and incorporates by reference each and every allegation contained in paragraphs 1 through 37 as though fully set forth herein.

39. There was and is, implied in the relationship which exists between plaintiff and defendant SMITH, a

covenant of good faith and fair dealing wherein defendant covenanted that he would deal fairly and honestly with plaintiff and do nothing to interfere with, impair or hinder the ability of plaintiff to enjoy the benefit of The Agreement.

40. Defendant SMITH has breached the implied covenant of good faith and fair dealing.

41. Defendant SMITH has failed to act honestly and fairly by misleading plaintiff into believing that the parcel was a legal lot when defendant knew or should have known otherwise, and by withholding information which would have alerted plaintiff that they were not purchasing legal lots.

42. As a proximate result of defendant SMITH's breach of the implied covenant of good faith and fair dealing, plaintiff has been damaged in an amount to be proved at trial. Such acts and omissions by defendant SMITH were done willfully, wantonly, and in conscious disregard of plaintiff's rights and were done with the knowledge that such acts and omissions would substantially injure plaintiff's rights under The Agreement and would jeopardize plaintiff financially as alleged herein, entitling plaintiff to punitive and exemplary damages in an amount to be proved at trial.

WHEREFORE, plaintiff prays for judgment against defendants as follows:

1. For a decree that defendant be ordered to pay plaintiff the following sums:

a. The down payment made by plaintiff to defendant in the sum of $50,000.00;

b. The sums paid, or which will be paid, by plaintiff for closing costs, title insurance, casualty and liability insurance, principal and interest on outstanding obligations, taxes, fees for engineers and consultants, and miscellaneous costs in an amount to be proved at trial;

2. For a decree that The Agreement be rescinded and that plaintiff be relieved of liability on the Promissory Note and Deed of Trust;

3. For a decree that plaintiff be ordered to convey the parcel to defendant SMITH by quitclaim deed on condition that defendant SMITH pay to plaintiff the sums as ordered by the judgment of this court;

4. For a decree that any sums which this court finds to be due to plaintiff from defendant be declared a lien on the parcel;

5. For general damages according to proof;

6. For special damages according to proof;

7. For punitive and exemplary damages according to proof;

8. For costs of suit incurred herein;

9. For attorney's fees; and

10. For such other and further relief as the court may deem proper.

DATED: May 15, 1991

MUNS, MEHALICK &
LYNN
A Professional Corporation

By:_____
James B. Mehalick
Attorneys for Plaintiff

SALE ESCROW INSTRUCTIONS

TO:
North American Title Company
1011 Camino Del Rio South, Suite 300
San Diego CA 92108
619 260-6500

ESCROW NO: 01-5142-LT
DATE: October 13, 1989

LEANNE TILTON
SENIOR ESCROW OFFICER

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7. Buyer and seller agree that access to Lots "J", "T" and "U" is possible over public street inside the snakewall. South of old water reservoir on Lot "U".

8. Buyer and seller agree that seller is retaining ownership of vacated Oribia Street which joins Lot "U" East line.

9. The sales agreement for Lots "T", "I" and "J" provides that the [illegible] "J" may, at his expense, top trees and shrubbery, on Lot "U" to a ma [illegible] feet above sea leval. Buyer of Lot "U" accepts and agrees with this [illegible] seller and the buyer of saids lots.

10. Buyer and seller agree that no structure of any kind shall be b [illegible] "U" which is at or below 205 feet above sea leval (Exhibit F).

11. Buyer has been advised by seller that the Northwest corner of L [illegible] access driveway for 1993 Zapo St., Owner James Mathews, which is the "U" on its North lot line.

12. Buyer agrees to relocate, at his expense, same size pipe and meter, city water service to seller's 2100 Gatun Street residence. Presently this service is provided from

Zapo St. across Lot "U". Buyer has option to relocate, at his expense, said service from Gatun St., Should buyer not relocate said service to Gaun St., then and in that event, buyer will relocate said service over Lot "U" and grant to seller the appropritate utility easement over said new location, at buyer's expense, including, but not limited to engineers cost to describe new utility easement.

THE ABOVE DOES NOT CONSTITUTE A DIRECTION TO THE ESCROW HOLDER, AND ESCROW HOLDER IS HEREBY RELEASED OF ANY AND ALL LIABILITY AND/OR RESPONSIBILITY IN EFFECTING SAME.

THESE INSTRUCTIONS DO NOT CANCEL NOR SUPERSEDE THE OFFER TO PURCHASE NOR ANY COUNTER OFFERS THERETO AND ALL ITEMS NOT NAMED IN THESE INSTRUCTIONS REMAIN IN EFFECT AND ESCROW HOLDER IS NOT TO BE CONCERNED AND/OR LIABLE FOR SAID UNNAMED ITEMS.

(PORTION OF EXHIBIT A TO COMPLAINT)

GRANT DEED

By this instrument dated THIRTEENTH DAY OF OCTOBER, 1989, for a valuable consideration receipt of which is hereby acknowledged,

JAMES E. SMITH, AN UNMARRIED MAN, hereby GRANTS to DELBERT W. PIFER, AN UNMARRIED MAN, the following described real property in the CITY OF DEL MAR, County of SAN DIEGO, State of CALIFORNIA:

LOT "U" IN BLOCK 12 OF ARDEN HEIGHTS UNIT NO. 4, ACCORDING TO MAP THEREOF NO. 1343, FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY.

See exhibit "A" attached hereto and made a part hereof.

/s/ JAMES E. SMITH
JAMES E. SMITH

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)ss.

On this 13th day of Oct., in the year 1989, before me, the undersigned, a Notary Public in and for State, personally appeared JAMES E. SMITH, [illegible] on the basis of satisfactory evidence [illegible].

/s/Leanne Tilton

(Exhibit "B")

EXHIBIT "A"

"Grantee by acceptance of this deed, agree for himself, his heirs, successors and/or assigns, that no structure, or any part thereof, including television antennae, satellite dish, etc., erected on the herein described property, nor any trees, shrubbery or vegetation of any kind shall exceed a height of 245 feet in elevation, above sea leval on Lot "U". This restriction is for the benefit of Lots "I", "J", and "K" of ARDEN HEIGHTS UNIT NO. 3, Map No. 1265, for the benefit of Lot "T" of ARDEN HEIGHTS UNIT NO. 4, Map No. 1343, all filed in the Office of Recorder of San Diego County.

INTENTION TO RECORD A NOTICE OF VIOLATION

NOTICE IS HEREBY GIVEN, that on the 22th day of January, 1991, at 7:00 p.m. in the Del Mar Communications Center, 240 Tenth Street Del Mar, California, the City Council will hold an administrative hearing with the Intention to Record a Notice of Violation for the following real property apparently illegally subdivided, which was previously described as:

Lot U, in Block 12 of ARDEN HEIGHTS UNIT NO. 4, according to Map thereof No. 1343, filed in the office of the County Recorder of San Diego County.

Assessor's Parcel Number: 299-192-24

Owner: Delbert Pifer

Staff examined the grant deeds, titles and subdivision mapping of the property mentioned above and has concluded that upon the transfer of the lot to the current owner, not all of the lot area was conveyed. Namely, the abandoned street portion of the lot was retained by the seller. Therefore, pursuant to Government Code Section 66412.6.(b), not all of the lot area existing prior to March 4, 1972 was transferred to the current owner (see copy of quitclaim deed recorded on May 23, 1935, which is attached hereto).

You, as the owners of the aforementioned property will have an opportunity and may present evidence to the

City Council as to why the Notice of Violation should not be recorded.

IF YOU FAIL TO RESPOND TO THE CITY WITHIN 15 DAYS OF RECEIPT OF THIS NOTICE, YOU WILL HAVE WAIVED YOUR RIGHT TO OBJECT AND A NOTICE OF VIOLATION WILL BE RECORDED.

If you should have any questions please feel free to contact Monica Tuchscher, Associate Planner at (619) 755-9337.

December 6, 1990 — DATE

/s/ M. Isabel Gomez/for — PATTI BARNES, City Clerk

EXHIBIT "E"

RECORDING REQUESTED BY AND MAILED TO:
City Clerk
City of Del Mar
1050 Camino del Mar
Del Mar, CA 92014

NOTICE OF VIOLATION
ILLEGAL SUBDIVISION

NOTICE 1S HEREBY GIVEN that the following described real property was illegally subdivided:

A portion of Lot U, in Block 12 of ARDEN HEIGHTS UNIT NO. 4, according to Map thereof No. 1343, filed in the office of the County Recorder of San Diego County, described as:

Assessor's
Parcel Number: 299-192-24

Current owner
of record
of portion: Delbert Pifer

Not all of the lot area existing prior to March 4, 1972 was transferred to the current owner. Namely, the vacated portion of Gatun was retained by the seller.

Signed: /s/James Sandoval Date: January 11, 1991
J. D. SANDOVAL
Planning Director
City of Del Mar

EXHIBIT "F"

APPENDIX J

RESOLUTION NO. 87-71

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DEL MAR, CALIFORNIA, DENYING APPLICATION D-87-1 FILED BY JAMES E. SMITH RELATING TO THE SNAKEWALL PROPERTY

WHEREAS, James E. Smith, as owner of 20 lots located within the City of Del Mar, and commonly known collectively as the "Snakewall Property", filed Application D-87-1 seeking a determination by the city of Del Mar that the current zoning of his property was unconstitutional and that the City of Del Mar was required, therefore, to rezone his property.

WHEREAS, on June 22, 1987, the City Council conducted a hearing to consider D-87-1.

WHEREAS, the City Council considered the documents presented together with the oral presentation from James E. Smith, members of the public, and members of the City staff.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Del Mar, California, that the following findings are made:

1. The Snakewall Property is comprised of 20 lots of record which can be developed in accordance with the Municipal Code.

2. The reasonableness of the existing zoning regulations is described in the staff reports of June 15, 1987 and May 13, 1987, which are attached hereto.

3. The existing zoning was placed upon the Snakewall Property in 1975.

4. A Notice of Merger was recorded against the Snakewall Property in 1977. Thereafter, in December 1977, James E. Smith purchased the Snakewall Property.

5. In 1985, the City of Del Mar released the the Notice of Merger.

6. From December 1977 to the present, James E. Smith has not made an application to develop the Snakewall Property nor submitted an application to resubdivide the Snakewall Property.

BE IT FURTHER RESOLVED that the City Council concludes that existing zoning of the Snakewall Property is not in violation of James E. Smith's rights under either the State or Federal Constitutions.

BE IT FURTHER RESOLVED that the conclusion reached by the City Council in this matter does not relate to or prejudice any application for development or rezoning of the Snakewall Property that James E. Smith may determine to submit.

BE IT FURTHER RESOLVED that pursuant to Section 1095.5 of the Code of Civil Procedure, the provisions of Section 1094.6 of the Code of Civil Procedure are applicable to persons seeking judicial review of this decision.

PASSED AND ADOPTED by the City Council of the City of Del Mar, California, this 6th day of July 1987, by the following vote.

AYES: Councilmembers Barnett, Eisenberg; Mayor Delaney
NAYS: None
ABSENT: Councilmember Hopkins, Gillies

/s/
RONNIE DELAYEN, Mayor

ATTEST:

/s/
JO SEIBERT, City Clerk

APPENDIX K

City of Del Mar
1050 Camino del Mar
Del Mar, California 92014

DEPARTMENT OF PLANNING
AND COMMUNITY DEVELOPMENT

July 15, 1986

Robert J. Zajac
Hillyer and Irwin
530 B Street, 14th Floor
San Diego, CA 92101-4479

Re: Snakewall Property

Dear Mr. Zajac:

As we discussed, the City has determined that the Snakewall Property was legally subdivided in the early 1900's. These lots are considered to be legal lots of record, and are potentially buildable, subject to final review by the department of Planning and Community Development. Some of the lots may have easement access difficulties, so individuals interested in acquiring these properties should thoroughly investigate the sites and the access.

The lots which now can be validly sold are the following:

(1) Arden Heights #3, Map #1285, recorded September 22, 1910, which sets forth Lots G, H, I, J, K, L. M, N, O, and S.

(2) Arden Heights #4, Map 1343, recorded June 8, 1911, which sets forth Lots A, B, T, and U.

(3) Arden Heights #4, Map 1592, recorded July 18, 1913, which sets forth Lots 780, 781, 782, 783, 784, and 785.

Sincerely,

/s/ Lise Strandgaard
LISE STRANDGAARD
Director of Planning
and Community Development

APPENDIX L

RECORDING REQUESTED BY

NORTH AMERICAN TITLE

WHEN RECORDED MAIL TO:
James E. Smith
2100 Gatun St.
Del Mar, CA 92014

ORDER NO:
ESCROW NO: 01-5142-LT

SHORT FORM DEED OF TRUST AND ASSIGNMENT OF RENTS

This Deed of Trust, made this THIRTEENTH DAY OF OCTOBER, 1989, between DELBERT W. PIFER AN UNMARRIED MAN, herein called TRUSTOR, whose address is 13872 Mercado St. Del Mar CA 92014 NORTH AMERICAN TITLE COMPANY INC., a California Corporation, herein call TRUSTEE, and

JAMES E. SMITH, AN UNMARRIED MAN, herein called BENEFICIARY,

Witnesseth: That Trustor IRREVOCABLY GRANTS, TRANSFERS AND ASSIGNS TO TRUSTEE IN TRUST, WITH POWER OF SALE, that property in SAN DIEGO County, California, described as:

LOT "U" IN BLOCK 12 OF ARDEN HEIGHTS UNIT

NO. 4, ACCORDING TO MAP THEREOF NO. 1343. FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY.

IF THE TRUSTOR OR HIS SUCCESSORS IN INTEREST, SHALL SELL, CONVEY OR ALIENATE THE PROPERTY DESCRIBED HEREIN, OR ANY PART THEREOF, OR ANY INTEREST HEREIN, IN ANY MaNNER OR WAY, WHETHER VOLUNTARY OR INVOLUNTARY, ANY INDEBTEDNESS OR OBLIGATION SECURED HEREBY, AT THE OPTION OF THE HOLDER HEREOF. AND WITHOUT DEMAND OR NOTICE, SHALL IMMEDIATELY BECOME DUE AND PAYABLE. NOT WITHSTANDING THIS RECITAL, BENEFICIARY AGREES THAT HE WILL ALLOW ASSUMPTION OF THE NOTE SECURED BY THIS DEED OF TRUST TO AN APPROVED, CREDIT WORTHY BUYER, WITH APPROVAL NOT TO BE REASONABLY WITHHELD.

TOGETHER with the rents, issues and profits thereof. SUBJECT, HOWEVER, to the right, power, and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues and profits.
FOR THE PURPOSE OF SECURING: 1. Performance of each agreement of Trustor herein contained; 2. payment of the indebtedness evidenced by one promissory note of even date herewith in the principal sum of $ 350, 000.00 executed by Trustor in favor of Beneficiary or order; 3. payment of any money that may be advanced by the Beneficiary to Trustor, or his

successors with interest thereon.

TO PROTECT THE SECURITY OF THIS DEED OF TRUST, TRUSTOR AGREES: By the execution and delivery of this Deed of Trust and the note secured hereby, that provisions (1) to (13) inclusive, of the fictitious deeds of trust recorded April 10, 1969, in Book T6168 Page 257, of Official Records in the office of the Recorder of Los Angeles County, California and recorded November 20, 1968 in Book 8793 Page 602, of Official Records in the office of the Recorder of Orange County, California and recorded February 15, 1977 in Book 1977 Page 24850 of Official Records in the office of the Recorder of Riverside County, California and recorded February 15, 1977 in Book 9115 Page 1084 of Official Records in the office of the Recorder of San Bernardino County, California and recorded February 15, 1977 as Document Number 77-057045 in the office of the Recorder of San Diego County, California and recorded on February 15, 1977 as Document Number 77-7016 in the office of the. Recorder of Santa Barbara County, California and recorded February 15, 1977 in Book 4771 Page 423 in the office of the Recorder of Ventura County, California (which provisions are printed on the reverse hereof) hereby are adopted and incorporated herein and made a part hereof as fully as though set forth herein at length; that he will observe and perform said provisions; and that the references to property, obligations and parties in said provisions shall be construed to refer to the property, obligations, and parties set forth in this Deed of Trust.

The undersigned Trustor requests that a copy of any Notice of Default and of any Notice of Sale hereunder be mailed to him at his address hereinbefore set forth.

For any statement regarding the obligations secured hereby, Beneficiary may charge the maximum amount permitted by law at the time of the request therefor.

Signature of Trustor

/s/_____
DELBERT W. PIFER

STATE OF SAN DIEGO }
COUNTY OF SAN DIEGO } ss.

On this 13th day of Oct., in the year 1989, before me, the undersigned, a Notary Public in and for said State, personally appeared DELBERT W. PIFER, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged to me that he (she or they) executed it.

Signature /s/LEANNE TILTON
Notary Public in and for said State

APPENDIX M

CITY OF DEL MAR
STAFF REPORT

TO: Honorable Mayor and City Council

FROM: James D. Sandoval, Planning Director via Gloria Curry, City Manager
prepared by Stephen Power, Assistant Planner

DATE: November 5, 1990

SUBJECT: Appeal of Design Review Board approval of DRB-90-44

ISSUE:

Whether to uphold the decision of the Design Review Board approving DP-B-90-44.

RECOMMENDATION:

That the-City Council uphold the decision of the DRB approving DRB-90-44.

BACKGROUND:

The project site is located on Lot "U" of the Snakewall properties. The subject parcel is currently vacant and is 19,419 square feet in area. Access to the site will be taken directly of Zapo Street. Surrounding uses are single-family residential in character.

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

The parcel is situated within the North Hills Planning District. The North Hills District contains most of the Very Low Density Residential development within the City of Del Mar. The Community plan describes the area as follows: "Winding streets, steep sites, relatively large lots, and informal small and moderate-sized single-family homes typify this area. The Community Plan recommends Very Low Density Residential development for the area order to minimize the disruption of the topography and preserve an open space character to these highly visible and sensitive areas."

Council Action:

The site is also located in the R1-40 Zone. The R1-40 Zone is designated for Very Low Density Residential Development at a density of 0-1 units per net acre. The Community Plan states that, "This land use category is intended to allow single-family development that preserves an open character on land within areas that include steep slopes, bluffs, and/or canyons."

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

The project site is situated within the Bluff, Slope, and Canyon Overlay Zone, which is intended to "preserve and protect the sandstone bluffs, canyons and steep slopes that bring diversity Del Mar's natural environment." Please refer to Attachment "A" to review the requirements of the BSC Overlay Zone.

The subject parcel also lays within the boundaries of Dieguito River Valley Regional Open Space Park (Focused Planning Area). Significant development within the Focused Planning Area is subject to the review of the Joint Powers Authority. The project was reviewed by the JPA at their meeting of July 12, 1990. As a result of the JPA's review of this and other projects, the JPA will be formulating drainage and watershed protection guidelines for projects within the Focused Planning Area.

Planning Commission Review:

Because the project site is located within the Open Space Overlay Zone, the applicant has been required to obtain a Conditional Use Permit (CUP-90-02) for the proposed residence. At the Planning Commission meeting of July 10, 1990, concerns were raised by Commission members regarding such issues as drainage, structural bulk, height, amount of hardscape, and the

number of openings in the Snakewall. Also, the Planning Commission requested that the applicant erect story poles on site, to enable Commission members to more accurately assess visual impacts associated with the proposed structure. Please refer to Attachments "B" and "C" to review the staff report and minutes from the PC meeting of July 10, 1990 regarding this item.

The Planning Commission unanimously approved CUP-90-02 at their meeting of August 14, 1990. Although the Commission voted to approve this Conditional Use Permit, concerns were raised regarding such issues as drainage to the east of the site,as well as the project's adherence to the requirements of the Bluff, Slope, and Canyon Overlay Zone. Also, the Planning Commission expressed concerns regarding proposed landscaping for the site, the bulk of the structure, the incorporation of outdoor patios, and the adequacy of the 15.5 foot garage door opening for the structure. The Commission requested that the DRB take all of the above factors into consideration when analyzing the project. The staff report and minutes from the PC meeting of August 14, 1990 regarding CUP-90-02 can be reviewed in Attachments "D" and "E".

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

Design Review:

Design Review Application DRB-90-44 was initially reviewed and continued by the DRB, at its meeting of August 29, 1990. At that meeting, the DRB expressed concerns regarding the bulk of the structure as viewed from Zapo Street. The DRB voted to continue the item, and instructed the applicant to reduce the visual bulk of the proposed residence. Specifically, the applicant was requested to lower the proposed residence's living room roof, and make the second floor of the residence more the first floor. Also, concerns were expressed regarding the visual impact of a proposed roof deck, as well as the need to use darker exterior finish colors for the residence. Please refer to Attachments "F" and "G" to review the DRB staff report and minutes regarding DR2-90-44.

DRB-90-44 was approved (6-0-1, Meredith absent) by the DRB at their meeting of September 26, 1990. The applicant modified the DRB meeting of August 29, 1990, in order address concerns expressed by the Board at that meeting. As approved, the project plans depict a living room roof that has been lowered from approximately 20 feet above grade to 16 feet above grade. The roof over the living room portion of the residence has been lowered to minimize structural bulk.

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

The level of a deck situated on top of the living room roof has also been lowered. The railing of the deck has been changed from pipe railing. According to the revised and approved plans, the entire home has been "sunk" one foot further into the ground, thus lowering the overall height of the structure by one foot. At the DRB meeting of September 26, 1990, Board members expressed their belief that significant concessions had been made by the applicant, and that the design of the proposed residence was appropriate for the site. The Board also stated that although the residence would be visible from Zapo street, its bulk had been effectively mitigated through revisions made to the project plans. Because of these modifications to the project plans, the Board voted to approve the subject residence. Please refer to Attachments "H" and "I" to review the staff report and minutes from the DRB meeting of September 26, 1990 regarding this item.

Project Specific Information:

The applicant has received DRB approval to construct a 2,423 square foot, single-family residence, situated over 1,327 square feet of basement area. The development site is substandard in terms of lot area, in that the R1-40 Zone calls for a minimum lot size of 40,000 square feet, and the subject lot is 19,419 square feet in

area. The 19,419 square foot lot area is considered to be a legal non-conformity. Given the maximum allowable FAR of 12.5% for the R1-40 Zone, a residence of no more than 2,427 square feet could be constructed on the site, absent a variance.

The topography of the development site consists of steep sandstone bluffs, along with a large "crater" created by the removal of a previously existing water tank. The existing "crater" is approximately 10 feet deep, with an average elevation around its perimeter of 219.75 feet above sea level. The basement portion of the residence would be situated within the subject crater.

Although the proposed residence would consist of four "levels" (2 levels of basement, first floor, second floor), considered to contain no more than two stories for purposes of consistency with the DMMC requirements. According the recently implemented Ordinance No. 541, "level" and "story" are defined as follows:

> Level. A horizontal division of a building extending from a floor to the next floor above, or, if there is no higher floor, to the ceiling directly above. If the finished floor of the one portion of a building lies no more than four feet above or below that of an

adjacent finished floor, it shall be considered as being the same level as that of the adjacent floor. A level may or may not be a story.

Story. That portion of a building included between the upper surface of any floor and the upper surface of the floor next above it. If any part of any level of a building is considered a story, that entire level shall be considered a story. If there is no floor above, then the space between such floor and the highest point of the finished ceiling next above it shall be considered a story. story shall include:

1. A basement if at any point, the finished floor above is higher than three feet above the lowest point of the natural or finished grade, whichever is lower.

As depicted on "Page 4" of the project plans, the residence maintains separate "levels" for the garage and living portions of the residence's basement area. The garage and basement living (family room) portions of the structure, are considered to be independent levels, because there would be over a four foot differentiation between the finished floor of the garage and the finished floor of the family room.

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

Per the above referenced definition of "story", the garage area the structure has been counted as a story, by virtue of the fact that there is more than three feet between the lower of existing or proposed grade (garage floor), and the finished floor above. The family room portion of the residence, however, has not been counted as a story, because it is not considered to be the same "level" as the garage, and there is not more than three feet between the lower of existing or proposed grade and the finished floor above. Therefore, the proposed residence does not exceed the two story maximum for residential structures per Section 30.86.110 A. of the DMMC.

The implementation of Ordinance No. 541 has established two permissible types of basement areas for residential structures within the City of Del Mar; the "true" or midwestern style basement, and the "partial" basement. The "true" basement is surrounded by earth on all sides, and has no more than two feet of exposure between the lower of existing or finished grade and the ceiling of the basement. Light wells are permitted in "true basement" areas provided that their utilization does not result in more than 40% of the perimeter of the basement being exposed. The family room portion of the proposed residence meets the "true" basement, as specified in the DMHC. Because the residence's

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

family room is considered to be a "true" basement, it does not qualify as floor area for purposes of calculating the Floor Area Ratio (FAR) of the structure.

Per Ordinance No. 541, the garage portion of the residence qualifies as a partial basement. A partial basement is an area having an exposed side or sides, were any portion of the finished floor over the basement is more than three feet above the lower of adjacent natural or finished grade. The exposure of a partial basement has to be continuous and limited to no more than two sides of the basement's perimeter. According to Ordinance No. 541;

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

APPENDIX N

STATE OF CALIFORNIA--THE RESOURCES AGENCY
CALIFORNIA COASTAL COMMISSION
SAN DIEGO COAST DISTRICT
Camino Del Rio South, Suite 123 Date February 11, 1991
(619) 297-9740 Application No. 6-90-283

NOTICE OF INTENT TO ISSUE PERMIT

On February 5, 1991, the California Coastal Commission approved the application of Delbert Pifer Jr. subject to the attached standard.and special conditions. for the development described below:

Description: Construction of a three-level, 3,245 sq.ft. single family residence on a vacant 19,419 sq.ft. lot.

Lot Area	19,419 sq. ft.
Building Coverage	1.662 sq. ft. (9%)
Pavement Coverage	3.~08 sq. ft. (19%)
Landscape Coverage	14.049 sq. ft. (72%)
Parking Spaces	4
Zoning	R-l-40
Plan Designation	Very Low Density -

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

Residential
Ht abv fin grade 21 feet

Site: 1977 Zapo St., Del Mar, San Diego County.
APN 299-192-24

The permit will be held in the San Diego District Office of the Commission, pending fulfillment of Special Conditions 1 & 2. When these conditions have been satisfied, the permit will be issued.

CHARLES DAMM
DISTRICT DIRECTOR
BY

/s/ Ellen Leiley

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

NOTICE OF INTENT TO ISSUE PERMIT NO.
6-90-283

STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgement. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. Expiration. If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. Compliance. All development must occur in strict compliance with the proposal as set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.

6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

SPECIAL CONDITIONS:

The permit is subject to the following conditions:

1. On- and Off-Site Drainage Plans. Prior to the issuance of the coastal development permit, the applicant shall submit for the review and written approval of the Executive Director, a drainage and

runoff control plan. This plan shall document that runoff from the roof, driveway and other impervious surfaces will be collected and appropriately discharged into the existing street drainage system and away from the hillside in order to protect the scenic resources and habitat values of the hillside from degradation by scouring or concentrated runoff.

Off-site drainage improvements, required by the City of Del Mar to satisfy Condition #5 of the City Permit #DR[3-90-44, are not herein approved. Plans for all off-site drainage improvements which require a coastal development permit shall be reviewed through a separate permit action or as an amendment to this permit. In addition, any modification to the City's permit requirements would require an amendment to this permit.

To Honorable Mayor and City Council
From J.D. Sandoval, Planning Director
Regarding Appeal of DRB-90-44
November 5, 1990

NOTICE OF INTENT TO ISSUE PERMIT NO. 6-90-283

SPECIAL CONDITIONS, continued:

2. Open Space Deed Restriction. Prior to the issuance of the coastal development permit, the applicant shall record a restriction against the subject property, free of all prior liens and encumbrances, except for tax liens, and binding on the permittee's successors in interest and any subsequent purchasers of any portion of the real property.' The restriction shall prohibit any alteration of landforms, removal of vegetation (other than selective thinning and pruning for brush management purposes) or the erection of structures of any type (other than such drainage improvements as may be approved pursuant to Special Condition #1) in the area shown on the attached Exhibit "3," and generally described as all natural slopes at or exceeding 25% gradient. The recording document shall include legal descriptions of both the applicant's entire parcel(s) and the restricted area, and shall be in a form and content

acceptable to the Executive Director. Evidence of recordation of such restriction shall be subject to the review and written approval of the Executive Director.

(0283N)